88-111

No. 88-

Supreme Court, U.S.
FILED
JUL 18 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JAMES W. AUSTIN, CARL E. YORK, JR., and
RICHARD F. LERT, Trustees of the
Ariana A. Fairbanks Trust Dated
April 28, 1978,
ROBERT O. BULLARD, JR., and CARL E. YORK, JR.
Successor Trustees of the
1976 Austin Revocable Trust
Dated December 11, 1976,

Petitioners,

vs.

CITY AND COUNTY OF HONOLULU,
a Municipal Corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the second prong of *Williamson*, requiring that a state court remedy be "reasonable, certain and adequate," is met where no statutory procedure or decided case authorizes a monetary damage remedy for any inverse condemnation, and the only existing state cases deny the remedy.

2. Whether a county's efforts to landbank property for street widening by utilizing a construction ban, misrepresentation and other oppressive conduct constitute a "regulatory taking" under *Williamson*, and if not, whether *Williamson* applies to such non-regulatory takings.

3. Whether, when State law is negative or at best unclear, the Court should apply an abstention analysis rather than a jurisdictional ripeness test.

4. Whether a Circuit Court should, absent jurisdictional findings by the District Court, order reversal and dismissal of a federal inverse condemnation judgment, or remand the action for jurisdictional findings.

LIST OF PARTIES AFFECTED

All persons affected by this case are listed as parties in the caption.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioners JAMES W. AUSTIN, CARL E. YORK, JR., and RICHARD F. LERT, Trustees of the Ariana A. Fairbanks Trust Dated April 28, 1978, ROBERT O. BULLARD, JR., and CARL E. YORK, JR., Successor Trustees of the 1976 Austin Revocable Trust Dated December 11, 1976 respectfully pray that

a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit in the above case.

OPINIONS BELOW

The decision of the court of appeals is reported at 840 F.2d 678 and is reprinted as Appendix A, pp. 1a-10a *infra*. Its unpublished Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc is reprinted as Appendix B, pp. 11a-12a *infra*. The unpublished decision of the United States District Court for the District of Hawaii is reprinted as Appendix C, pp. 13a-36a *infra*.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on February 24, 1988 (Appendix A, at p. 1a). A timely Petition for Rehearing and Suggestion for Rehearing En Banc was denied on April 20, 1988 (Appendix B, at p. 11a). Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sections 1254(1) and 2101(c). The basis of jurisdiction in the District Court was 42 U.S.C Section 1983.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part that

> No person shall . . . be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the United States Constitution provides in relevant part that

> No State shall. . .deprive any person of life, liberty, or property, without due process of law. . . .

The Hawaii State Constitution provides in relevant part in Article I, Section 5 that

> No person shall be deprived of life, liberty or property without due process of law. . .

The Hawaii State Constitution provides in relevant part in Article I, Section 20 that

> Private property shall not be taken or damaged for public use without just compensation. [Am Const Con 1968 and election Nov 5, 1968; ren Const Con 1978 and election Nov 7, 1978]

STATUTES INVOLVED

42 U.S.C. Section 1983, *Civil action for deprivation of rights*, provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Hawaii Rev. Stat., Sections 101-3, 101-25, and 101-33 (1985).

Hawaii Revised Statute Section 101-3, *Entry upon private property by agreement*, provides in relevant part: In the event the State or a county thereof enters upon privately owned real property by authortiy of an agreement to acquire the real property either by voluntary action of the parties or by condemnation,. . .

Hawaii Revised Statute Section 101-25 *Payment of judgment penalties*, provides in relevant part: The plaintiff shall within two years after final judgment pay the amount assessed as compensation or damages . . . and if such payment is delayed more than thirty days after final judgment, then interest shall be added at the rate of five per cent a year.

Hawaii Revised Statute Section 101-33 *Allowance of Interest, etc.*, provides in relevant part: If an order is made letting the plaintiff into possession . . . the final judgment shall include, as part of the just compensation and damages awarded, interest at the rate provided in section 101-25 from the date of order until paid by the plaintiff.

STATEMENT OF THE CASE

A. Introduction.

The primary issue in this case is whether a federal inverse condemnation action should be dismissed where there is no existing statutory or judicial remedy for inverse condemnation and virtually no possibility that a state court might establish in the future a remedy for inverse condemnation. *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194, 105 S.Ct. 3108, 3121, 87 L.Ed. 2d 126, 144 (1985) ("*Williamson*"),

requires federal dismissal only when the state court remedies are "reasonable, *certain* and adequate" (emphasis added).

The Ninth Circuit reversed and dismissed a federal inverse condemnation action after judgment was rendered for the landowners following a five day trial. The Ninth Circuit, acting on unsupported jurisdictional facts which it found itself, ignoring contrary findings by the District Court, and applying a wholly new, untenable, and vague negative proof requirement, eliminated access to the federal courts for aggrieved property owners in Hawaii—a state whose history of refusing to compensate for takings of property rights is well-documented in the federal Courts.

Indeed, the Hawaii Supreme Court's most recent refusal to recognize state taking liability has led to an extraordinary conflict between it and the federal courts attempting to enforce the Fifth Amendment, with the United States District Court concluding that the state court:

> cut off and shut off each and every attempt on the part of plaintiffs' attorneys to argue the constitutional problems . . . when one reads the court's interpretation of what occurred . . . one can only conclude that . . . [its] statements were deliberately and grossly misleading (and if presented in the federal courts, would *mandate* F.R.Civ.P. Rule 11 sanctions). It was only in this federal court that the plaintiffs had a full and uncircumscribed opportunity to raise the constitutional questions.

Robinson v. Ariyoshi, 676 F.Supp. 1002, 1018 (D. Haw. 1987)(emphasis in original).

The Hawaii Supreme Court's stance is radically unreceptive to compensatory remedies, and goes far beyond even the position of the California Supreme Court in *Agins v. City of Tiburon*, 24 Cal.3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *prob. juris. noted*, 444 U.S. 1011, 100 S.Ct. 658, 62 L.Ed.2d 639, *aff'd*, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980). Hawaii courts are said to have no authority to award damages for *any* taking whatsoever, other than in formal condemnation proceedings, because Hawaii has not statutorily waived its immunity to damage suits. Only injunctive relief is available. *See Robinson v. Ariyoshi*, 65 Haw. 641, 658 P.2d 287 (1982), *reconsideration denied*, 66 Haw. 528, 726 P.2d 1133 (1983) ("*Robinson*").

Further, the Hawaii Supreme Court has been found by the federal court not merely to have denied compensatory relief, but to have framed its answers to the Ninth Circuit on the subject "by misdirection, misinformation, misapplication, and misconstruction" so as to avoid the taking implications of its own decision. *See Robinson v. Ariyoshi*, 676 F.Supp. at 1019.

The situation is dire for Hawaii landowners aggrieved by state or local takings. They have no reasonable forum other than federal court. Hawaii law *is* certain—damages are prohibited altogether. It is not, however, adequate under the Fifth Amendment. The Ninth Circuit has ignored the "certainty" requirement of *Williamson* by placing on owners the impossible burden of proving, in the absence of law, that a remedy does not exist "under any circumstances." In practical terms, this distortion of *Williamson*

completely denies due process because it forces the landowner to proceed in state court in every case, even though the state court antipathy to a compensatory remedy is well known, and then sets up statutes of limitations, collateral estoppel and res judicata barriers when the federal action can finally be undertaken.

In Hawaii, no statute and no reported case establish a right to money damages for inverse condemnation, and, in the three reported cases, the Hawaii Supreme Court has expressly denied money damages. *Allen v. City and County of Honolulu*, 58 Haw. 432, 437-39, 571 P.2d 328, 330-31 (1977); *City and County of Honolulu v. Chun*, 54 Haw. 287, 290, 506 P.2d 770, 772 *reh'g denied*, 54 Haw. 441 (1973) ("*Chun*"); *Robinson*, 65 Haw. at 658 n.13, 658 P.2d at 300 n.13. Moreover, the same condemning authority—the City and County of Honolulu—was found by another Ninth Circuit panel only two weeks after the decision below, to have conceded in another case that there is no money damage remedy for inverse condemnation under Hawaii law! *Lai v. City and County of Honolulu*, 841 F.2d 301, 303 (9th Cir. 1988) ("*Lai*").

Where there is no statute or case which holds that a remedy exists, and all reported Hawaii cases deny such a remedy, the Ninth Circuit's extension of *Williamson* places an intolerable burden on landowner by putting fundamental federal Constitutional rights beyond the landowners' reach.

B. The City's Scheme to Acquire Austins' Property for Street-Widening Without Paying Just Compensation.

Petitioners ("the Austins") own a parcel of land on King Street in downtown Honolulu, Hawaii. In 1977, they asked Respondent ("the City") for building per-

mits to build a store and parking lot ("the store") on the parcel. Permits were denied because of set backs on the City's development maps which were created to preserve land for later street widening. Construction of the store in the set back area would have substantially increased the City's cost of condemnation when the street was widened (Appendix C, at p. 15a-16a).

Austins and the City generally recognized the City had no right to stop construction in the set back area, and Austins indicated they intended to proceed. To induce the Austins to reduce the size of their proposed store and preserve the strip for street widening, the City Council by unanimous resolution and with approval of the administration, represented that it would buy the strip, and directed allocation of funds for the purchase. Appendix C, at pp. 22a-23a.

In reliance, the Austins reduced the size of their store and left the strip undeveloped for the City's purchase, thereby rendering the strip valueless for any purpose other than street widening. Later, the City dishonored its representations by refusing to purchase the 20-foot strip (Appendix C, at pp. 27a-28a). The strip is now a part of the public sidewalk along King Street, is not useful for any economic purpose, and in fact constitutes a continued burden and liability. Appendix C, at pp. 23a, 28a and 32a. The City has never initiated condemnation proceedings.

C. The District Court Trial and Judgment for the Austins.

In January 1984, the Austins filed a complaint against the City in the United States District Court for the District of Hawaii, alleging that the 20-foot

strip had been taken in violation of the Fifth and Fourteenth Amendments of the United States Constitution, 42 U.S.C. Section 1983, and Article I, Section 5 and 20 of the Hawaii Constitution.

The parties stipulated to the value of the strip and the date of the taking, March 8, 1978. The issues at trial were liability and post-taking interest. The District Court held that Austins' property had been taken by the City and awarded the stipulated value plus fair market interest damages, as proved. In light of the City's conduct, the court noted at trial that the City's late suggestion that Austins should have sought a variance was disingenuous, and found that variance procedures would have been futile in the circumstances.

D. The Ninth Circuit's Surprising Sua Sponte Dismissal.

The City's appeal did not challenge the lower court's findings, but asserted for the first time that Austin's claims were not ripe under *Williamson*.[1]

At oral argument, the Ninth Circuit panel learned that Hawaii has no statutory or common law inverse condemnation procedure and requested additional briefing on the subject in light of *Williamson*'s second prong.

The Ninth Circuit then dismissed the case *sua sponte*, and extended *Williamson* to impose an exhaustion of remedies test, although it admitted that "we find no [Hawaii] case which recognizes inverse condemnation as a cause of action. . .". Appendix A,

[1] The Austins cross-appealed for pre-judgment interest from the stipulated date of the taking and for attorney's fees.

at pp. 7a-8a. The Court made a brief, speculative and incorrect analysis of Hawaii law and concluded only that *Williamson* applied if the existence of state remedies had not been proven to be impossible: "[U]ntil the state courts establish that landowners *may not* obtain just compensation through an inverse condemnation action *under any circumstances*, Hawaii procedures are adequate within the terms of *Williamson* . . . ." Appendix A, at p. 8a (Emphasis added).

The Court thereby turned *Williamson* on its head and placed an impossible burden on the Austins to prove that phantom Hawaii state remedies are inadequate, without any meaningful application of *Williamson's* requirement of a "reasonable, certain and adequate" state procedure for compensation.

Two weeks later another Ninth Circuit panel found that the same condemning authority—the City and County of Honolulu—agreed that there is no damage remedy for inverse condemnation in Hawaii. "Here, although the parties agree that there are no state procedures for such compensation claims, the Lais did not seek a variance," *Lai*, 841 F.2d at 303. Appendix D, at p. 40a.

REASONS FOR GRANTING THE WRIT:

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I.

THE NINTH CIRCUIT'S EXTENSION OF *WILLIAMSON* CREATED AN IMPOSSIBLE BURDEN WHICH WILL COMPLETELY DENY AGGRIEVED LANDOWNERS ACCESS TO THE FEDERAL COURTS AND DUE PROCESS.

Under Hawaii statutory and case law and by the City's own admission, money damages are not available

in Hawaii. *Allen*, 58 Haw. at 437-39, 571 P.2d at 330-31; and *Chun*, 54 Haw. at 290, 506 P.2d at 772. Ignoring these facts, and *Williamson's* requirement of certainty for state procedures, the Ninth Circuit extended the exhaustion rule to a whole new class of cases: *now, instead of showing that there are no adequate or certain state procedures to obtain compensation, the aggrieved landowner must prove that there is no remedy and that the State courts definitely would not establish one "under any circumstances."*[2]

This is an obviously impossible burden. It is not, and could not be, the law. For this Court has repeatedly held that federal taking litigation must be dismissed *only* where State remedies are "reasonable, certain and adequate . . . at the time of the taking," *Williamson*, 473 U.S. at 194, 105 S.Ct. at 3121, 87 L.Ed.2d. at 144, or where "available and facially adequate," *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 351, 106 S.Ct. 2561, 2567, 91 L.Ed.2d 285, 296, *reh'g denied*, ___ U.S. ___, 107 S.Ct. 22, 92 L.Ed.2d 773 (1986)("*MacDonald*").

Every case since *Williamson*, other than the Ninth Circuit below, actually examined local law and determined whether state compensation procedures were "reasonable, certain and adequate" at the time of the

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[2] The cases cited by the Ninth Circuit for the proposition that *Williamson* requires aggrieved landowners to pursue uncertain state law remedies, are merely *dictum* on this point. *Culebras Enterprises Corp. v. Rivera Rios*, 813 F.2d. 506 (1st Cir. 1987), *vacated*, 846 F.2d 94 (1988) was clearly decided on other grounds and *Littlefield v. City of Afton*, 785 F.2d 596 (8th Cir. 1986) had already held the claim premature under *Williamson's* first prong.

taking, or remanded the case to the district court for proper jurisdictional findings.[3]

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[3] **UNITED STATES SUPREME COURT:**
Williamson, 473 U.S. at 196, 105 S.Ct. at 3122, 87 L.Ed.2d at 145. "Under Tennessee law, a property owner may bring an inverse condemnation action to obtain just compensation for an alleged taking of property under certain circumstances." *Id.* (citation omitted).

FIRST CIRCUIT:
Culebras, 813 F.2d at 513-14 (The Court observed that the Supreme Court of Puerto Rico recognizes the general availability of an inverse condemnation remedy in cases such as this and that "*Appellants . . . do not dispute the existence of a local inverse condemnation remedy*, whatever its ultimate utility on the present facts." (emphasis added)).

EIGHTH CIRCUIT:
Littlefield, 785 F.2d at 609 (Held that landowner's "claim for a taking is premature because the decision of the planning commission is not final because a variance has not been sought and denied" and that "*McShane* [*v. City of Faribault*, 292 N.W.2d 253 (Minn. 1980)] convinces us that an inverse condemnation action may be available to appellants.").

NINTH CIRCUIT:
Cassettari v. Nevada County, Cal., 824 F.2d 735, 738 (9th Cir. 1987) (After reviewing California statutory and case law, the Court concluded that "adequate state compensation procedure is available to Cassettari."); *Furey v. City of Sacramento*, 780 F.2d 1448, 1450 n.1 (9th Cir. 1986) ("*Furey*") ("Furey has no remaining state procedure by which to secure compensation."); and *McMillan v. Goleta Water District*, 792 F.2d 1453, 1459 (9th Cir. 1986), *cert. denied*, ___ U.S. ___, 107 S.Ct. 1348, 94 L.Ed.2d 519 (1987) ("*McMillan*") (federal action ripe where state remedies were but an "abstract possibility"); *Norco Construction, Inc. v. King County*, 801 F.2d 1143, 1146 (9th Cir. 1986) ("*Norco*") (Because "[n]either party in this case has discussed whether Washington law provides" relief for inverse condemnation, the case was remanded to the district court for

Yet the Ninth Circuit improperly swept away this court's certainty test by conditioning federal actions on proof that state remedies are impossible.

A. Under Hawaii Statutory and Case Law and by the City's Admission, No Procedures or Remedies Exist for Inverse Condemnations in Hawaii.

Hawaii statutory and case law and the City's admission establish that there are no procedures for compensation and that State remedies are neither facially adequate nor available.[4]

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findings on that issue.).

ELEVENTH CIRCUIT:

Boothe v. Manatee County, Fla., 812 F.2d 1372, 1373, *reh'g denied*, 818 F.2d 871 (11th Cir. 1987) (§ 1983 action was dismissed because "Florida law provides an inverse condemnation remedy upon the taking of a right of way for road purposes and Boothe has not shown that the inverse condemnation procedure is unavailable or inadequate."); *Corn v. City of Lauderdale Lakes*, 816 F.2d 1514, 1519-20 (11th Cir. 1987) ("*Corn*") (Because "Florida does not avail a property owner an action to recover just compensation through inverse condemnation for injuries sustained as a result of an unreasonable zoning ordinance later declared invalid," the Court held that "Corn's action passes the two-pronged test of *Williamson County*, and is ripe for review on the merits."); *Anthony v. Franklin County*, 799 F.2d 681, *reh'g denied*, 804 F.2d 681, 684 (11th Cir. 1986) (Because "Florida law provides compensation for deprivation or impairment of the right of access, which may be enforced in an action for inverse condemnation" and "Appellants have not shown that the Florida procedures were unavailable or inadequate . . . , their taking claim is premature." [citations omitted]).

[4] The taking claims of aggrieved landowners were permitted to go forward by the Ninth Circuit in *Furey*, 780 F.2d at 1450 n.1, and by the Eleventh Circuit in *Corn*, 816 F.2d at 1519-20, because the courts concluded, after actual review, that the relevant state law did not provide an adequate remedy. Hawaii

The Hawaii Supreme Court has held that the state's unwaived sovereign immunity precludes any damage suit for a taking. *Robinson*, 65 Haw. 641, 658 P.2d 287 (1982), *reconsideration denied*, 66 Haw. 528, 726 P.2d 1133 (1983). The only remedy in state court is injunctive relief. *Id.*, *see also Allen*, 58 Haw. at 438-439, 571 P.2d at 331 (invalidation, rather than damages, is proper remedy).

Eminent domain under Hawaii law is exercised under Chapter 101 of the Hawaii Revised Statutes, which has been construed to allow money damages only according to the literal language of the statutes themselves. Thus, the Supreme Court of Hawaii denied pre-summons damages because the statute did not authorize damages before the date of the formal condemnation filing: "To say that the defendant's right to compensation and damages shall be deemed to have 'accrued' at the date of the summons is equivalent to saying that his property shall be deemed to have been taken at that time." *Chun*, 54 Haw. at 289, 506 P.2d at 771. (quoting *Honolulu v. Lord*, 36 Haw. 348, 354 (1943)) (Appendix E, at p. 44a).[5]

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inverse condemnation law is less adequate than those reviewed in *Furey* and *Corn*.

[5] As noted in Justice Levison's reasoned dissent, the *Chun* majority's "self-serving" reliance on the statutory language effectively ignores the just compensation requirements of both the state and federal constitutions. 54 Haw. at 291, 506 P.2d at 772.

The Hawaii Supreme Court employed the same "statutory adherence" technique in denying all damage liability for the taking in *Robinson v. Ariyoshi*, 676 F.Supp. at 1017 ("No suit for damages is permissible [in Hawaii state court], because there is no enabling statute"); *see also Robinson*, 65 Haw. at 658 n.13,

More generally, a federal court has recently concluded that "[n]o suit for damages is permissible [in Hawaii courts], because there is no enabling statute." *Robinson v. Ariyoshi*, 676 F.Supp. at 1017 n.5.

In support of its "finding" that inverse condemnation remedies may be available in Hawaii, the Ninth Circuit, in a footnote, cited Section 101-3 of the Hawaii Revised Statutes as a possible source for state court relief.[6] This section, by its plain terms, is inapplicable, and the Ninth Circuit's reliance on it is truly extraordinary because application of the section is conditioned on the government's physical entry on private land: "Entry upon private property by agreement. In the event the state or a county thereof enters upon privately owned real property. . . .," Hawaii Rev. Stat. Section 101-3 (1985).

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658 P.2d at 300 n.13 ("The State may, of course, only be sued pursuant to a waiver of its immunity. [citations omitted]. And we agree with Appellees that our applicable statutes contain no provision for a suit against the State seeking damages based on any "taking" . . . [but] a suit in state court similar to that filed in [this case] . . . , seeking to enjoin an unconstitutional application . . . by state officials would not be precluded by the doctrine of sovereign immunity.")

[6] In contrast to this suggestion by the Ninth Circuit, both the federal district court in Hawaii and the Hawaii Supreme Court have specifically recognized that Hawaii has no statutory remedy for inverse condemnation:

Robinson v. Ariyoshi, 676 F.Supp. at 1017 ("No suit for damages is permissible [in Hawaii state court], because there is no enabling statute"). *Robinson*, 65 Haw. at 658, n. 13, 658 P.2d at 300 ("[W]e agree with Appellees that our applicable statutes contain no provision for a suit against the State seeking damages based on any "taking")

In this case, no one has contended that the City has actually entered upon the property. Thus, the Ninth Circuit incorrectly held that the Austins should be required to allege in state court that the section should be judicially extended to situations in which the government has not physically entered upon private property. Such an approach would be directly contrary to the plain words of the statute, the *Chun* case, and the Ninth Circuit's own "finding" that there was no physical taking in this case.

The Hawaii Supreme Court specifically rejected money damages in regulatory inverse condemnation cases to ensure that the Hawaii Courts are not put in the position of invading the legislative control over expenditure of public monies. *Allen*, 58 Haw. at 438, 571 P.2d at 331 (Appendix F, at pp. 49a-56a).

In *Allen*, the landowner claimed compensation for losses due to a downzoning of property during the development process. The Hawaii Supreme Court rejected the claim altogether stating that:

> Monetary awards in zoning disputes would . . . have a detrimental effect on the community's control of the allocation of its resources. An article dealing with inverse condemnation, another type of monetary award in downzoning cases states: ". . .it seems a usurpation of legislative power for a court to force compensation. Invalidation, rather than forced compensation, would seem to be the more expedient means of remedying legislative excesses."

Id. at 438-39, 571 P.2d at 331. (Appendix F, at pp. 55a-56a). The Court then overturned an award of

money damages, and held specifically that only injunctive relief would be available. *Id.*

Almost identical language in *Agins v. City of Tiburon*, 24 Cal.3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *prob. juris. noted*, 444 U.S. 1011, 100 S.Ct. 658, 62 L.Ed.2d 639, *aff'd*, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980) ("*Agins*"), led the Ninth Circuit in *Furey*, 780 F.2d 1448 (9th Cir. 1986) to conclude that no "reasonable, certain and adequate" remedy existed in California, in similar circumstances. And the Eleventh Circuit concluded in *Corn v. City of Lauderdale Lakes*, 816 F.2d 1514, 1519-20 (11th Cir. 1987) that similar language in Florida cases indicated the unavailability of an adequate remedy within the meaning of *Williamson*.

Hawaii's Supreme Court has itself twice, in the last dozen years, been held by the Hawaii U.S. District court to have taken property, by judicially changing the law to convert privately owned water rights and shoreline property to State ownership without compensation to the owners. *See Robinson v. Ariyoshi*[7], 441 F.Supp. 559 (D. Haw. 1977), *aff'd in part, vacated in part*, 753 F.2d 1468 (9th Cir. 1985), *cert. granted and judgment vacated*, 477 U.S. 902, 106 S.Ct. 3269, 91 L.Ed.2d 560, *aff'd on remand*, 676 F.Supp. 1002 (D. Haw. 1987)(enjoined retroactive taking of water rights, without compensation, for and by the State); *Sotomura v. County of Hawaii*, 402 F.Supp. 95 (D.

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[7] Eventually remanded by this Court for determination in light of *Williamson*, *Robinson v. Ariyoshi* was strongly affirmed by the Hawaii federal district court in a decision which fully explored the finality of the state court's taking conduct. 676 F.Supp. 1002.

Haw. 1975) (Hawaii Supreme Court attempted to take a strip of shoreline property by redefining the ocean side property line from the mean high water mark to the upper wash of the waves; the federal district court held that "a state cannot be permitted to defeat the constitutional prohibition against taking property without due process of law . . . ," *id.* at 106 (quoting *Hughes v. Washington*, 389 U.S. 290, 296, 88 S.Ct. 438, 442, 19 L.Ed.2d. 530, 535 (1967) (Stewart, J., concurring)).[8]

Finally, the Hawaii Supreme Court's stated position is that the state's sovereign immunity absolutely precludes a damage suit in state court, since there is no express statutory waiver of the immunity. *Robinson*, 65 Haw. at 658 n.13, 658 P.2d at 300 n.13.

During the brief period of Hawaii's statehood, it has been the universal practice to file inverse condemnation cases in the Hawaii United States District Court. *See, e.g., Matthewman v. Akahane*, 574 F.Supp. 1510 (D. Haw. 1983). With the state's absolute immunity to damage suits, with no statutory basis for recovery, and with all judicial precedents negative,

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[8] Moreover, the measure of damages in those eminent domain proceedings which are permitted in Hawaii, would not pass federal muster in any event. In this case, the District Court awarded interest damages based upon applicable federal interest rates, from the time of taking at about 11% per annum. But the Hawaii statutes limit post-taking interest to five percent, Hawaii Rev. Stat. Sections 101-25 & 101-33 (1985) and six percent, Hawaii Rev. Stat. Section 101-3 (1985). The Hawaii Supreme Court has upheld the statute limiting interest to below market rates. *See, e.g. City and County v. Market Place, Ltd.*, 55 Haw. 226, 233, 517 P.2d 7 (1973). This clearly violates federal standards.

the Ninth Circuit's conclusion that the abstract possibility of an inverse condemnation cause of action in Hawaii meets the *Williamson's* standards of "reasonableness, adequacy and certainty", is simply unfair and irrational.

II.

THE NINTH CIRCUIT'S DISMISSAL OF A NON-REGULATORY, INVERSE CONDEMNATION ACTION ERRONEOUSLY EXTENDED *WILLIAMSON* TO ALL NON-REGULATORY AND OPPRESSIVE TAKING CASES

This case presents the further question whether a taking for the sole purpose of landbanking property for future road widening, accomplished by misrepresentation and other oppressive means, falls within *Williamson*.[9]

Williamson applied only to *regulatory* takings because, first, the local processes relating to special permits, variances and the like must be exhausted before the Courts can determine what the real money damages are and, second, because use and occupancy of the property were not denied to the plaintiff.

Thus, the cases of *Williamson*, 473 U.S. at 185, 105 S.Ct. at 3116, 87 L.Ed.2d at 138, and *MacDonald*, 477 U.S. at 351, 106 S.Ct. at 2567, 91 L.Ed.2d at 296, required exhaustion of available state remedies for takings of private property "by the application of

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[9] An "oppressive" taking may occur without physical invasion where, for example, "a public entity acting in furtherance of a public project directly and substantially interferes with property rights and thereby significantly impairs the value of property . . . ." *Richmond Elks Hall Association v. Richmond Redevelopment Agency*, 561 F.2d 1327, 1330 (9th Cir. 1977).

government regulations". However, the Ninth Circuit and others have correctly excluded "physical takings" from the application of *Williamson*. *See, e.g., Hall v. City of Santa Barbara*, 813 F.2d 198 (9th Cir. 1986). Similarly, non-regulatory "oppressive conduct" takings do not suffer from the regulatory uncertainty addressed in *Williamson*.[10]

Clearly the City's denial of all economic use of Austin's property by oppressive means constituted a permanent, non-regulatory taking. The Ninth Circuit's dismissal therefore improperly and unnecessarily extended *Williamson* to a broad class of non-regulatory taking cases.

More fundamentally, this case involved oppressive conduct completely unrelated to any "land use regulation." First, the City attempted to force dedication of the strip by improperly withholding a building permit; then it committed to purchase the strip in order to prevent construction; finally, it reneged on its commitment after the landowner irrevocably changed position in reliance.

This conduct was wrongful and oppressive and was found at trial to work a taking. No "regulation of use" was at issue, and there was no nexus between the City's conduct and its true purpose.

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[10] *Martino v. Santa Clara Valley Water District*, 703 F.2d 1141 (9th Cir. 1983), *cert. denied*, 464 U.S. 847, 104 S.Ct. 151, 78 L.Ed.2d 141 (1983); *Richmond*, 561 F.2d at 1327. In fact, a Hawaii landowner's claim based on "oppressive conduct" taking by the City has specifically been allowed to go forward in *Kaiser Development Co. v. City and County of Honolulu*, 649 F.Supp. 926, 943 (D. Haw. 1986) despite dismissal of the concomitant "regulatory" claims under *Williamson*.

> Whatever may be the outer limits of "legitimate state interests" in the takings and land use context, this is not one of them. In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but "an out-and-out plan of extortion."

Nollan v. California Coastal Commission, ___U.S. ___, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987) (citing *J.E.D. Associates, Inc. v. Atkinson*, 121 N.H. 581, 584, 432 A.2d 12, 14-15 (1981)). *See also Gordon v. City of Warren*, 579 F.2d 386 (6th Cir. 1978).

III.

WHERE REMEDIES UNDER STATE LAW ARE BUT AN "ABSTRACT POSSIBILITY", FEDERAL COURTS SHOULD APPLY ABSTENTION CONCEPTS RATHER THAN *WILLIAMSON* PREMATURITY STANDARDS.

Because Hawaii state remedies were not "reasonable, certain and adequate . . . at the time of the taking," but were highly unlikely, the Ninth Circuit should not have engaged in a tortured "ripeness" analysis, but should have been guided by existing caselaw applying abstention concepts.

In *McMillan v. Goleta Water District*, 792 F.2d 1453, 1459 (9th Cir. 1986), *cert. denied*, ___U.S. ___, 107 S.Ct. 1348, 94 L.Ed.2d 519 (1987), the Ninth Circuit considered a case involving a water district moratorium on new hookups. Since state remedies were not clearly available in that context, the Ninth Circuit did not dismiss for prematurity under the second prong of *Williamson*, or abstain under *Railroad*

Commission of Texas v. Pullman, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941).

Instead, the *McMillan* court actually analyzed California law, including specifically *Agins*, 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372, and concluded:

> If the California state courts would conclude that *Agins* applies solely to zoning ordinances, and not to the water moratorium ordinance, and if the McMillans recover just compensation via an inverse condemnation action, then the need for constitutional adjudication by the federal court would be obviated.
>
> *However a federal court need not abstain merely because there exists the abstract possibility that state courts might render adjudication of the federal question unnecessary. Hawaii Housing Authority v. Midkiff*, 467 U.S. at 237, 104 S.Ct. at 2327. *See also Midkiff v. Tom*, 702 F.2d at 789-90, n. 1. Consequently the district court did not abuse its discretion by failing to abstain.

792 F.2d. at 1459 (footnote omitted) (emphasis added).

Given the Hawaii Supreme Court's declarations in *Robinson*, *Allen*, and *Chun*, there is no likelihood that Hawaii Courts would establish a new right to damages for inverse condemnation. Hence, there is only the barest abstract possibility that the case "might be mooted or presented in a different posture by a state court determination of pertinent state law." *Colorado River Water Conservation District v. U.S.*, 424 U.S. 800, 814, 96 S.Ct. 1236, 1244, 47 L.Ed.2d 483, 496, *reh'g denied* 426 U.S. 912, 96 S.Ct. 2239, 48

L.Ed.2d 839 (1976) (quoting *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 189, 79 S.Ct. 1060, 1063, 3 L.Ed.2d 1163, 1166 (1959)).

IV.

THE NINTH CIRCUIT PANEL'S DECISION CONFLICTS WITH THIS COURT'S OPINIONS IN *WILLIAMSON* AND *MacDONALD*, SEVERAL OF ITS OWN OPINIONS, AND OTHER CIRCUIT COURT OPINIONS.

The Ninth Circuit panel decisions are frankly erratic, conflict with *Williamson* and *MacDonald*, as well as Ninth Circuit decisions, and, in this case, apply a harsh and unrealistic standard to the Austins.

First, the Ninth Circuit conflicts with this Court's application of *Williamson* and *MacDonald* to only regulatory takings, and to the requirement in both cases that the state court remedy be "reasonable, certain and adequate".

Second, the Ninth Circuit conflicts with its own prior holdings of: *Furey*, 780 F.2d at 1450 n.1 (federal action ripe where no state remedies were available); *Norco Construction Inc. v. King County*, 801 F.2d 1143, 1146 (9th Cir. 1986) (remanded case for District Court to determine whether state law provides remedies); *McMillan*, 792 F.2d at 1459 (federal action ripe where state remedies were but an "abstract possibility"); *Martino v. Santa Clara Valley Water District*, 703 F.2d 1141 (9th Cir. 1983), *cert. denied*, 464 U.S. 847, 104 S.Ct. 151, 78 L.Ed.2d 141 (1983) (federal action ripe where land taken by "oppressive conduct").

Finally, the Ninth Circuit conflicts with the Eleventh Circuit Court decisions which held a federal in-

verse condemnation action ripe where state law provides no remedy. *Corn*, 816 F.2d at 1519-20 n.2.

V.

THE NINTH CIRCUIT ERRED BY NOT (1) REMANDING TO THE DISTRICT COURT TO FIND JURISDICTIONAL FACTS OR (2) SENDING CERTIFIED QUESTIONS TO THE HAWAII SUPREME COURT

The Ninth Circuit plainly erred by not remanding the case to the lower court for jurisdiction findings or certifying questions to the Hawaii Supreme Court.

First, the Ninth Circuit panel below hopelessly conflicted with another panel decision in *Lai*, 841 F.2d at 303, which found that the City conceded money damages were unavailable in Hawaii in inverse condemnations.

Second, this panel conflicted with another panel decision in *Norco*, 801 F.2d at 1146, which held that the adequacy of state remedies is to be decided by the district court.

Here, the Circuit Court inexplicably determined "jurisdictional facts" which are seriously in conflict with the District Court's factual findings that: (1) the purpose of the taking and the oppressive conduct was to cause acquisition of the Austins' land for road widening; and (2) given that purpose, seeking a variance would have been a useless gesture. Indeed, if the Ninth Circuit Court believed that a real question as to Hawaii law existed, it should have certified the question to the Hawaii Supreme Court before ruling.[11]

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[11] The Hawaii federal district court has, however, recently expressed serious reservations about the candor of the Hawaii

Without so doing, the Court sends Austins back to the vagaries of the State court with sovereign immunity bars, uncertain statutes of limitation and other barriers, after the case has already been tried and won on the merits.

The Ninth Circuit's decision has created irreconcilable conflicts among the many cases in this area, which now can only be resolved by this Court.

CONCLUSION

The Ninth Circuit's decision creates an untenable state of confusion and inconsistency for landowners faced with the "Hobson's Choice" of pursuing unavailable State remedies or uncertain federal remedies, with the possibility in either case of allowing the statute of limitations to destroy any possible remedy depending on the erratic application of *Williamson* standards by the federal courts. No landowner may rest secure while so roving a commission such as the Ninth Circuit is at large.

Federal Courts should not distort *Williamson* so as to deny federal constitutional protections to those who otherwise have no "reasonable, certain and adequate" protection. Hawaii landowners have no compensatory remedy (much less any *procedure*) for inverse condemnation. To correct the excess and error of the decision below, this Court should GRANT this Petition for Writ of Certiorari.

Supreme Court's responses to certified questions in a judicial taking case.

Finding the Hawaii Supreme Court's responses "deliberately and grossly misleading," the district court concluded that only in the federal forum could the aggrieved owners receive a full opportunity to raise the Fifth Amendment questions. *Robinson v. Ariyoshi*, 676 F.Supp. at 1018.

Respectfully submitted,

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APPENDIX

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JAMES W. AUSTIN; CARL E. YORK, JR.; RICHARD F. LERT, Trustees of the Ariana A. Fairbanks Trust dated April 28, 1978; ROBERT O. BULLARD, JR.; CARL E. YORK, JR., Successor Trustees of the 1976 Austin Revocable Trust dated December 11, 1976,

Plaintiffs-Appellees, Cross-Appellants,

v.

CITY AND COUNTY OF HONOLULU, a municipal corporation,

Defendant-Appellant, Cross-Appellee.

Nos. 87-1540; 87-1571

D.C. No. CV 84-0035-HMF

OPINION

Appeal from the United States District Court
for the District of Hawaii
Harold M. Fong, Chief District Judge, Presiding

Argued November 2, 1987—Honolulu, Hawaii
Submitted December 3, 1987*

Filed February 24, 1988

Before: James R. Browning, Chief Judge, Eugene A. Wright, and Edward Leavy, Circuit Judges.

*The case was submitted after the parties filed supplemental briefs requested by the panel.

Opinion by Judge Wright

SUMMARY

Real Property/Constitutional Law

Appeal from judgment finding that city took a setback by its actions. Vacated. The court held that until the party pursues unsuccessfully compensation in the state courts or those courts established that the party may not recover compensation through inverse condemnation procedures, the claim is not ripe.

Appellee Austin owns land on King Street in Honolulu. Appellant Honolulu's Development Plan envisions widening the street and designates a 20-foot setback. Rather than seek a variance to build a store, Austin indicated that he was willing to sell the setback area to the city. Partially relying on his understanding that the city had committed itself to purchasing the land, he began construction in compliance with the setback requirement. The city then told him that it would not begin the street widening for several years and would not acquire the setback until then. Austin sued in district court alleging that the city's actions effected a taking for which it must pay just compensation. The court concluded that the city took the setback by its actions.

[1] A court cannot consider an alleged taking by regulation without a final and authoritative determination of the type and intensity of development legally permitted. Such a determination consists of a rejected development plan and denial of a variance. [2] To establish that the state failed to offer just compensation, a landowner must seek and be denied compensation through state procedures. [3] Austin did not seek a variance or compensation. [4] Inverse condemnation actions are not ripe for review in federal court until the plaintiff

establishes that the state failed to remedy the alleged violation. [5] Until the state courts establish that landowners may not obtain just compensation through an inverse condemnation action under any circumstances, Hawaii procedures are adequate. [6] Because he retains the right to exclude others, he has not suffered a physical taking.

COUNSEL

Jonathan Chun, Deputy Corporation Counsel, Honolulu, Hawaii, for the defendant-appellant/cross-appellee.

Ke-ching Ning, Green, Ning, Lilly & Jones, Honolulu, Hawaii, for the plaintiffs-appellees/cross-appellants.

OPINION

WRIGHT, Circuit Judge:

In this case we consider whether the Supreme Court's decision in *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985) concerning inverse condemnation and ripeness, applies in cases in which state remedies available to the claimant are uncertain and undeveloped. We conclude that it does. Until Austin pursues unsuccessfully compensation in the state courts or those courts establish that he may not recover compensation through inverse condemnation procedures, his claim is not ripe for federal court review.

BACKGROUND

Austin owns 16,339 square feet of land on King Street in downtown Honolulu. His lot is subject to the "Development Plan for the Central Business District of Honolulu." The

Plan, adopted in 1969, envisions widening King Street and designates a 20-foot setback. The Comprehensive Zoning Code of the city prohibits new structures within the setback. The city intends to acquire setback land by eminent domain once it begins to widen the street.

Until December 1978, Austin maintained a nonconforming commercial building that extended into the setback area. In 1978 he demolished the structure to build a store for Liberty House, a retail establishment. The City Planning Department rejected the plans for the store because the building would have occupied the setback in violation of the zoning ordinance. Rather than seek a variance, Austin communicated with the City Council, indicating that he was willing to amend his building plans and sell the setback area to the city.

Although the city refused initially to acquire the land, eventually the City Council began to negotiate with Austin to buy the setback. Relying on the progress of these negotiations and his understanding that the city had committed itself to purchasing the land, he renegotiated the lease with Liberty House to account for the reduction in floor space, and began construction in compliance with the setback requirement and the zoning code.

In September 1980, the city told Austin that it would not begin the street widening project for several years and would not acquire the setback until then. Austin sued in federal district court alleging that the city's actions effected a taking for which it must pay just compensation.

That court concluded that the city took the setback by the Council's actions. It rejected the city's argument that Austin should have sought a variance before his federal action, concluding that once the taking occurred, Austin could do nothing more to protect his interest. The city appealed.

ANALYSIS

We review *de novo* the court's conclusions of law. *United States v. McConney*, 728 F.2d 1195, 1201 (9th Cir.) *cert. denied*, 469 U.S. 824 (1984).

[1] To prevail in an inverse condemnation action the landowner must establish that the regulation or state action effects a taking, that it "goes too far," and that he or she has not received just compensation. *MacDonald, Sommer & Frates v. Yolo County*, 106 S. Ct. 2561, 2566 (1986).[1] Because the finding that a regulation effects a taking turns on how the regulation restricts the land, a court cannot consider an alleged taking by regulation without "a final and authoritative determination of the type and intensity of development legally permitted." *Id.* Such a final determination consists of two elements, a rejected development plan and denial of a variance. *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186-88 (1985); *Lake Nacimiento Ranch Co. v. County of San Luis Obispo County*, 830 F.2d 977, 980 (9th Cir. 1987).

[2] To establish that the state failed to offer just compensation, a landowner must seek and be denied compensation through state procedures, including an inverse condemnation action in state court, provided those procedures are adequate. *Williamson County*, 473 U.S. at 195. The Supreme Court explained:

> because the Constitution does not require pretaking compensation, and is instead satisfied by a reasonable and adequate provision for obtaining compensation after the taking, the State's action . . . is not 'complete' until the State fails to provide adequate compensation for the taking.

[1]Unlike *Herrington v. County of Sonoma*, Nos. 87-2620, 86-2728, slip op. (9th Cir. Dec. 24, 1987), Austin's only claim is for inverse condemnation.

473 U.S. at 195; *see also Cassettari v. Nevada County,* 824 F.2d 735, 737-38 (9th Cir. 1987).

[3] Austin did not seek a variance from the zoning ordinance or compensation in the state courts. He argues that these failures should not render his claim unripe. He claims that he received a final determination when the city refused to buy the land. Austin contends also that, because the State does not afford an adequate remedy by which he can be compensated, the ripeness analysis of *Williamson County* does not apply.

We need not address Austin's assertion that he was given a final determination from the city. Regardless of our conclusion on that issue, Austin's claim is not ripe for review in federal court because he failed to seek compensation through adequate state remedies.

[4] In *Williamson County* the Supreme Court recognized that inverse condemnation actions under the takings clause, like other claims under the Constitution, are not ripe for review in federal court until the plaintiff establishes that the state failed to remedy the alleged violation. 473 U.S. at 194-195 (analogizing to *Parratt v. Taylor,* 451 U.S. 527 (1974) which held that claimants must pursue state remedies before bringing federal action under the due process clause.) In an inverse condemnation action, the property owner must show that he or she sought just compensation and that the state denied it. "[N]o constitutional violation occurs until just compensation has been denied." *Williamson County,* 473 U.S. at 194 n.13.

Austin argues that his failure to seek compensation under state law should not render his claim unripe because state procedures are not "reasonable, certain, and adequate," as *Williamson County* requires.[2] He bears the burden of estab-

[2]This Court has stated in dictum that the adequacy of state remedies is an issue to be decided by the district court. *Norco Const. Inc. v. King*

lishing that state remedies are inadequate. *See Norco Constr., Inc. v. King County,* 801 F.2d 1143, 1146 (9th Cir. 1986).

Since the Court decided *Williamson County,* several federal courts have considered whether its holding applies when state law is unclear or undeveloped. *See, e.g., Culebras Enterprises Corp. v. Rivera Rios,* 813 F.2d 506 (1st Cir. 1987); *Littlefield v. City of Afton,* 785 F.2d 596 (8th Cir. 1986); *Lerman v. City of Portland,* No. 85-0374-P (Dec. 11, 1987), — F. Supp. — (D. Me. 1987); *Kaiser Dev. Co. v. City and County of Honolulu,* 649 F. Supp. 926 (D. Haw. 1986). These courts have applied *Williamson County* despite the uncertainty of state law, even when state courts have expressed unwillingness to award damages in inverse condemnation actions. *See, e.g., Littlefield,* 785 F.2d 596, 609 (8th Cir. 1986). The First Circuit noted in *Culebras*: "Lack of clarity is not unusual . . . when legal rights are still in process of definition through case-by-case adjudication." *Culebras,* 813 F.2d at 514.

The Hawaii Constitution provides: "Private property shall not be taken or damaged for public use without just compensation." Haw. Const. art. I, § 20. Austin points to state court decisions denying compensation for takings of vested rights and foregone development costs. He contends that these show that state courts will not award compensation under the constitutional provision. He notes also that neither the Hawaii Supreme Court nor the state legislature has recognized inverse condemnation as a cause of action.

[5] After reviewing Hawaii court decisions, we are unconvinced that Austin may not seek compensation under his state's constitutional provision. Although we find no case that

County, 801 F. 2d 1143, 1146 (9th Cir. 1986). Because the issue of ripeness affects our jurisdiction to hear this claim, and because that statement is dictum, we decline to follow *Norco.*

recognizes inverse condemnation as a cause of action, neither do we find one that rejects it.[3] Until the state courts establish that landowners may not obtain just compensation through an inverse condemnation action under any circumstances, Hawaii procedures are adequate within the terms of *Williamson County* and Austin's failure to use them cannot be excused. *Cf. Furey v. City of Sacramento,* 780 F.2d 1448, 1450 n.1 (9th Cir. 1986) ("[t]he California Supreme Court made clear that Furey's only remedy in a state court action would be 'declaratory relief or mandate precluding the application of the subject land-use regulations.' ") (citations omitted); *Corn v. City of Lauderdale Lakes,* 816 F.2d 1514, 1517 (11th Cir. 1987) ("equitable relief is the exclusive [state] remedy available to a property owner injured by virtue of a confiscatory zoning regulation.")

Austin contends next that *Williamson County* should not apply to his action because we have noted previously that it does not apply to cases involving physical takings. *See Hall v. City of Santa Barbara,* 833 F.2d 1270, 1281 n.28 (9th Cir. 1986). Austin claims that this case involves a physical taking.

[6] We reject the argument. First, Austin has not suffered a physical taking of his land. He retains title and possession. The city has not intruded on the setback, nor has it authorized others to do so. Austin may exclude the public, even the city, if he so chooses. " '[T]he right to exclude [others is] "one of the most essential sticks in the bundle of rights that are commonly characterized as property." ' " *See Nollan v. California Coastal Comm'n,* 107 S. Ct. 3141, 3145 (1987) (citations omitted). Because Austin retains this right, he has not suffered a physical taking. Furthermore, the discussion in *Hall* concerned only the requirement that landowners obtain a final determination. *Hall* did not address whether landown-

[3]Nor has Austin established that there is no possibility of relief under Hawaii Revised Statutes 101-3.

ers seeking compensation for a physical taking must first pursue compensation under state law.

Austin also argues also the district court's finding that the city took his property by its oppressive conduct, rather than by oppressive regulation, renders *Williamson County* inapplicable under *Martino v. Santa Clara Valley Water Dist.*, 703 F.2d 1141 (9th Cir.) *cert. denied*, 464 U.S. 847 (1983). In *Martino*, we found only that when a taking occurs through oppressive conduct, the landowner's failure to submit a plan and seek a variance from the local authority does not render the claim unripe. *Martino*, 703 F.2d at 1147. We did not consider the requirement that landowners seeking compensation under the takings clause first pursue state law remedies. Because *Martino* preceded *Williamson County*, our failure to address this requirement does not control our analysis here.

Finally, Austin contends that because the Court decided *Williamson County* a year and a half after he filed his federal action, it would be inequitable to apply it retroactively. He argues that under *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), we may decline to apply a decision retroactively if doing so would impose "injustice or hardship." *Id.* at 107.

Unless a claim is ripe, we do not have jurisdiction to hear it. *See United Public Workers of America v. Mitchell*, 330 U.S. 75, 89-91 (1947); and *Hart and Wechsler's The Federal Courts and the Federal System*, 145-146 (2d ed. 1973). Because *Williamson County* affects our jurisdiction to hear takings claims, we must apply it retroactively. "A court lacks discretion to consider the merits of a case over which it is without jurisdiction, and thus, by definition, a jurisdictional ruling may never be made prospective only." *Firestone Tire and Rubber Co. v. Risjord*, 449 U.S. 368, 379 (1981). Contrary to Austin's assertion, we have no discretion to extend our jurisdiction to hear his claim.

Because Austin's claim is not ripe for review in federal court, neither the district court nor this court has jurisdiction to hear it. The order of the district court is vacated. We remand the case for dismissal.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NOS. 87-1540
87-1571

DC# CV 84-0035-HMF

ORDER DENYING PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

JAMES W. AUSTIN; CARL E. YORK, JR., RICHARD F. LERT, Trustees of the Ariana A. Fairbanks Trust dated April 28, 1978; ROBERT O. BULLARD, JR.; CARL E. YORK, Successor Trustees of the 1976 Austin Revocable Trust dated December 11, 1976,

Plaintiffs-Appellees, Cross-Appellants,

vs.

CITY AND COUNTY OF HONOLULU, a municipal corporation,

Defendant-Appellant Cross-Appellee.

Before: BROWNING, Chief Judge, WRIGHT and LEAVY, Circuit Judges.

The panel has voted unanimously to deny the petition for rehearing, and Judges Browning and Leavy have voted to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

Filed: April 20, 1988

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

CIVIL NO. 84-0035

JAMES W. AUSTIN, CARL E. YORK, JR. and RICHARD F. LERT, Trustees of the Ariana A. Fairbanks Trust dated April 28, 1978, ROBERT O. BULLARD, JR. and CARL E. YORK, JR., Successor Trustees of the 1976 Austin Revocable Trust dated December 11, 1976,

Plaintiffs,

vs.

THE CITY AND COUNTY OF HONOLULU, a municipal corporation,

Defendant.

Filed
AUG 29, 1986

DECISION AND ORDER

The jury-waived trial in this case began on July 1, 1986. Ke-Ching Ning appeared on behalf of the plaintiffs, and Jonathan Chun appeared for the defendant. Upon consideration of all the evidence in this case, hearing oral argument, assessing the credibility of the witnesses who testified, examining all the documents and exhibits admitted into evidence, and reviewing the record, the court finds as follows:

FINDINGS OF FACT

1. The Plaintiffs in this action are James W. Austin, and Carl E. York, Jr. and Richard F. Lert, Trustees of the Ariana A. Fairbanks Trust dated April 28, 1978, and Robert O. Bullard, Jr. and Carl E. York, Jr., Successor Trustees of the 1976 Austin Revocable Trust dated December 11, 1976.

2. Plaintiff James W. Austin is a resident of the State of Hawaii. Plaintiffs Robert O. Bullard, Jr., Carl E. York, Jr., as Trustees, are residents of Massachusetts. Plaintiff Richard F. Lert, as Trustee, is a resident of New Jersey.

3. Defendant City and County of Honolulu is a municipal corporation of the State of Hawaii, invested with the right, power and capacity to take private property for public use.

4. Plaintiffs are the owners of a parcel of land being a portion of the block mauka on South King Street in downtown Honolulu and makai of Hotel Street, between Fort Street Mall and Bethel Street. The lot in question, identified by TMK No. 2-1-02-4, has a total area of approximately 16,339 square feet.

5. In 1976 and early 1977, the Plaintiffs ("Austins"), together with the Campbell Estate, negotiated with the downtown Liberty House for a new lease, under which the old Liberty House building was to be demolished, and a new building with attached garage constructed. In connection with that transaction, the size of the parcel in square footage was the key factor in determining the rent on the lease between the fee owners and Liberty House. In this project, the Campbell Estate had the role of managing partner, while the Austins were passive partners.

6. At that time, Architects Hawaii, Ltd., the land-owner's architect, found that the Primary Urban Center Development Plan. Ordinance 3217, adopted by the City Council in 1967, required a 20 foot wide setback or right of way on these parcels along King Street for the reason of future street widening.

The total square footage of the setback area on the Austin parcel was 2,659 square feet. On inquiry from Campbell Estate, the City Planning Department, which had jurisdiction over approval of such building plans, re-

jected the Liberty House plan, which called for building the new structure up to the property line.

7. On April 22, 1977, Howard Green, the attorney for the Austins, wrote a letter to Mrs. Bornhorst of the City Council. Among other things, he stated:

> The developer contemplates construction of substantial improvements. Obviously, once these improvements have been constructed, removal of them in order to widen [illegible] Street would be extremely expensive and would also cause damage to the business and to the value of the remainder of the building.
>
> . . . . my clients are unwilling to simply abandon the value represented by the portion of the land which the City may some time in the future desire to condemn.
>
> Under the circumstances, it would be my hope that a solution could be worked out under which the City would agree to condemn and take over this land and pay a reasonable price for it within the not too distant future. This would achieve for my clients the result of being able to realize on the existing value of this land assets and, at the same time, would save the City what could be hundreds of thousands of dollars in costs and damages over and above the actual value of the land.
>
> Let me emphasize, however, that my clients need a speedy resolution of this matter since otherwise we will be forced to go forward with development plans and incur expenses with respect to development of the entire parcel.

8. The City Council marked this letter as Misc. Com. No. 367. It was referred to the Council's Committee on Finance. Expenditures and Operations. By Committee Re-

port 1046, the Committee referred it to the City Administration for study.

A memorandum from Kazu Hayashida. Director of the Department of Transportation Services, dated July 5, 1977, to the Department of Public Works, stated: "We recommend that the 20-foot setback as designated on the Development Plan be acquired so that improvements planned for King Street will not be lost."

Mr. Hayashida testified at the trial that this meant that it was important to acquire the setback before the building of Liberty House improvements on it which would make future acquisition too costly. Mr. Hayashida also testified that his understanding was that funds should be made available for acquisition. If no funds were available, then the owner must be allowed to build.

9. Then the Administration, through a letter identified as D-1070, dated July 20, 1977, responded by a joint letter from the City's Director and Chief Engineer of Public Works, Director of Transportation Services, and the Director of Land Utilization. These were the three agencies most concerned with the issue. It stated that the setback acquisition cost, exclusive of improvements, would be about $266,000.00, and that it should be acquired with funds from the Miscellaneous Land Acquisition and Clearances for General Plan Street Setbacks account. The Managing Director concurred in this letter, and it represented the City Administration's position.

10. The Committee on Finance, Expenditures and Operations of the City Council (hereinafter "Finance Committee") held a meeting on August 17, 1977 to consider these communications. At this meeting, the Committee considered the widening of King Street, particularly at the location of another building on King Street called the Yat Loy Building. The owners of that building wanted to renovate it. The Council decided to permit renovations without enforcing the setback.

The Finance Committee disagreed with the City agencies' recommendation, and instead recommended to council that:

> The appropriate City Agencies be informed that Council has no plans to acquire lands for the future widening of King Street in the Central Business District; therefore, any application for building permit affected by this proposed widening need not be submitted to council.

(Committee Report No. 1571). This recommendation was adopted by the City Council on August 31, 1977.

11. However, it was apparent that the City, through certain of its agencies continued to advocate acquisition of the setback. The Department of Public Works, the policy-making agency that advised the Council on the need for street widening, told the Campbell Estate that the Liberty House plans would not be approved because the setback should be re-established.

Mr. Wallace Miyahira, director of that agency, told Mr. Stender, Campbell Estate's executive director, that Committee Report 1571 did not clearly delete the setback, and that the matter was therefore still "up in the air."

The City agencies wanted to obtain a review of the setback requirement before permitting any construction in the setback area. Therefore, on January 26, 1978, Mr. Stender, on behalf of Campbell Estate and the Austins, wrote again to Mrs. Bornhorst. That letter stated in part as follows:

> For your information, we are proceeding with plans for the development of the property located on the mauka side of King Street between Bethel Street and the Fort Street Mall. We have attached a set of plans showing the extent of the proposed project. As the plans show, the building will abut the property line along King Street.

> Due to the fact that there appears to be a question as to whether or not the City will acquire the property for street widening purposes and that this decision rests with the Council, we request that the matter be brought before the Council for decision.
>
> We have established a construction commencement date of July 1, 1978. The concerns outlined in Mr. Howard Green's letter require that the issue regarding the acquisition of the setback be determined prior to completion of construction drawings which are critical to our planned construction start date. Based on previous traffic studies for the downtown area, it has been anticipated that King Street will be widened at some future date. Present traffic congestions appear to confirm this requirement. Therefore, before proceeding further we would appreciate the City Council's early review and decision on this matter.

12. As a result of this letter, both the City Council and the City agencies undertook a review of the issue. On February 2, 1978, the Committee on Planning and Zoning (hereinafter "Planning Committee") discussed the Stender letter. Charles Prentiss from the Department of General Planning made clear that the Administration wanted the setback.

He made a distinction between the Nuuanu-King-Alakea-Beretania loop, which was central to the Downtown street widening plans, and streets outside the loop. Thus, he recommended that the Development Plan be implemented as to the King Street frontage of the subject property, while the Chinatown portions of King Street outside the loop be deferred for 10 to 20 years.

13. The Council members discussed the question of payment. The following colloquy occurred on February 2.

> Councilwoman Bornhorst: "But we don't have to compensate them for that much less floor area . . .?"
>
> Councilman Clements: "Due to the fact that there appears to be a question as to whether or not the City will acquire the property for street widening to me is a very clear statement of what I was talking about that they expect compensation. So I think we should address that."

14. On February 8, 1978, in response to the Campbell Estate letter, the Planning Committee recommended that action be deferred until the Departments of General Planning, Transportation Services, and Public Works and the Office of Council Services could meet to discuss the matter and to report back to Council. *See* Committee Report 331.

15. On February 21, 1978, the head of the Department of General Planning wrote to the Council, saying:

> Campbell Estate representatives have tentatively agreed that purchase by the City need not be made immediately[.] They agreed to landscape and maintain the setback area until the City can purchase it. There is a small, 850 square foot building at King and Fort Street Mall that extends into the setback area. This building will protrude into the sidewalk until the setback area is acquired by the City.

16. At the February 15, 1978 hearing of the Planning Committee, Mr. Prentiss continued to advocate the Administration's position that the setback should be maintained. Councilman Akahane said:

> The project really before us today is whether we are going to honor the setback or allow them to build up the property line. Once you put a new development up to the property line . . . the cost

> of condemnation becomes awfully high at a later date.

17. On February 22, 1978, by Committee Report No. 423, the Planning Committee referred again to the letter from Campbell Estate, and recommended that it be deferred, to be considered together with the original recommendation of non-acquisition contained in Finance Committee Report 1571, at a joint meeting of the Planning and Finance Committees.

18. The City Council's Planning and Finance Committees did hold a joint meeting on March 1, 1978, to which representatives of the Campbell Estate attended. At this meeting, Councilman Akahane said:

> To show our sincerity to the property owners that we should have something in the six-year plan showing acquisition or whatever action. This way I think the landowners would not min[d] setting back, knowing this. I don't want to say this thing we may come 10 or 20 years. I don't think that is fair.

On the same day, Campbell Estate discussed the acquisition of the setback with Councilman Akahane. Mr. Wade McVay noted these proceedings in a March 1, 1978 memorandum, in which he stated:

> On March 1 Bill Miller and I attended a joint meeting of the City Council's Planning and Finance Committees. The first item was the widening of King Street. Members of the City Administration's Traffic and Planning Departments made a presentation in which they stated that the King Street vehicular traffic was presently 2,300 cars per hour and was at its maximum. They said it will increase even with mass rapid transit and it will ultimately be necessary

to widen King Street, at least between Nuuanu and Alakea Streets.

The Finance Committee had previously informed the Austin Estate that the City had no intention of acquiring the King Street setback and that they could build on the land. However, the Finance Committee now concurred with the members of the Planning Committee that the twenty-foot setback line should be observed and that the City should budget to acquire the property during the upcoming six-year period. The meeting was adjourned at this point.

19. On March 8, 1978, by Committee Report No. 1, the Committees on Planning and Finance issued their joint report confirming the above:

1) Finance Committee Report No. 1571, dated August 31, 1977 be rescinded:

2) the 20-foot widening of King Street between Alakea Street and Nuuanu Avenue be retained:

3) the Administration be requested to reflect within the 6-year CIP the future acquisition of item (2) above:

It further stated that King Street widening outside the loop area would be deferred. This report was adopted by Council on March 8, 1978.

20. At about the same time, Mr. Stender had several discussions with both Mr. Miyahira and Mr. Toraki Matsumoto. Finance Committee Chairman as well as with Mr. Akahane.

Following these discussions, Mr. Stender drafted a memorandum showing proposed values and terms for acquisition. The price proposed was $76 per square foot, substantially less than the $100 per square foot that the

Department of Transportation Services had previously proposed.

Both proposals attributed no value to improvements. In addition, the Campbell Estate proposal provided that payment would be made over two years, and that the landowner would bear the cost of reconstruction and landscaping after the taking.

21. In addition, William Miller, Governmental Affairs Officer for Campbell Estate, also had conversations with Messrs. Akahane and Matsumoto, two Council members, regarding this matter. Miller and Akahane both affirmed that the Council action was a commitment on the part of the City, and that it would be placed in the six-year Capital Improvement Plan (hereinafter "CIP") as well as the next year's budget.

22. The evidence showed that the City Council members never disagreed with the proposition that the parcel would be acquired.

There was no evidence that any representatives of the City stated that the owners might never be paid, in the face of numerous statements from the owners evidencing their belief in and expectation of payment. The timetable for acquisition envisioned by the parties was less than six years.

Mr. Nakagawa testified that the outer limit was five years or the time at which the adjacent Ho and Bishop Trust Buildings were set back. Since this has been done, he said the acquisition should now occur.

23. The City now argues that even if a commitment to purchase was made, the time-frame was open-ended. This is contradicted by the two to three year time period contemplated by the owners and the less than six year period contemplated by the City.

It is also contradicted by the distinction between a timetable of 10 to 20 years for purchase of land outside the

loop, contrasted with immediate implementation planned for the land within the loop.

24. On the basis of these communications and actions, the plaintiffs completed lease negotiations with Liberty House and Liberty House commenced construction in late 1978 on a building which left the setback area clear for condemnation by the City.

25. Council included in the budget for fiscal year 1979-80, the next available budget year, an allocation of $425,000 from the Miscellaneous Land Acquisition and Clearances for General Plan Street Setbacks Fund to acquire this setback. This is consistent both with the July 20, 1977 letter from the Administration, and the March 8, 1978 Council action. The amount was sufficient to purchase the Austin-Campbell setbacks.

26. On June 14, 1979, the Mayor line-vetoed the allocation. His action was based on a disagreement with the Council regarding the use of federal Revenue Sharing Funds, which he line-vetoed out of all accounts. He did not line-veto $272,000, of the $425,000 in the account in question, which was to come from highway bond funds.

27. The Council overrode the Mayor's veto, and restored the budgeted item on July 11, 1979. Thereafter, it took a series of actions designed to assure the owners that the property would in fact be taken. These assurances were consistent with the previous positions taken by the City.

28. In 1979, the City Council proposed Bill 36, whereby Honolulu Revised Ordinances, Ordinance 2412, would be amended. That section originally required the City to pay the total cost of acquisition of any street setback area.

The amendment required the owner of land to dedicate to the City, at no cost to the City, any setback required in a general plan or development plan for city streets. The land owner would receive additional density as a tradeoff.

29. On September 26, 1979, Howard Green, attorney for the Austins, wrote to Mrs. Bornhorst and asked for her confirmation as to the effect of Bill 36 on the Austins. In part, the letter stated:

> In connection with my [previous] letter, it is my understanding that on March 1, 1978 the Joint Committee on Planning and Zoning and Finance, Expenditures and Operations determined that the 20-foot street setback area should be maintained and that condemnation would be implemented over a six-year period. Since that time, it is my understanding that the Trustees of the Estate of James Campbell have been having discussions with the City and County of Honolulu for purpose of implementing that decision.
>
> I have now been informed that Bill No. 36 has been drafted which, if passed, might require dedication of this street setback area by the property owners without compensation. I think the Bill, if so applied, would be inconsistent with all of our prior discussion with the commitments of City representatives.
>
> I think the proposal is extremely unfair if it would have that effect, and I think it is an inappropriate exercise of the police powers and would be tantamount to condemnation without payment.
>
> I have the personal feeling that the City has already done a lot of damage to the Austins. I call your attention to the fact that we have proceeded in good faith with the understanding that an appropriate condemnation was in process to permit our lessee to design and construct a building that would be consistent with your long-term desires to condemn the setback for street widening. This action on our part saved you hundreds of thousands if not millions of dollars. We would

> rather have made maximum use of the property as we are permitted by law to do so.

30. On November 7, 1979, the Finance Committee met to consider Bill No. 36. It issued Committee Report No. 1350, which was adopted by the Council on November 21, 1979. It incorporated by reference the substance of the letter dated October 23, 1979, identified as D-1218 from the City's Managing Director to Council, which responded to Mr. Green's letter of September 26, 1979, and stated:

> . . . Bill 36 will not have any effect on the building permit already issued for the building being constructed mauka of King Street, between Bethel Street and Fort Street Mall; however, on the other hand, if the owner or lessee of the property applied for a building permit or rezoning in the future, the provisions of Bill 36, if enacted, could be applicable, and in order to avoid such a problem, it may be advisable that an agreement regarding the acquisition of the King Street setback area involving the land presently being developed be negotiated somewhat similar to the one involving the South Street setback area near Kapiolani Boulevard and which included an agreed price with a covenant for deferred purchase; further, if the Council concurs, the Administration should be authorized by the Council to negotiate with the affected owners accordingly.

The Council adopted the Finance Committee recommendation to authorize the Administration to enter into an acquisition agreement. A copy of Com. Rpt. 1350 was sent to Howard Green.

31. Both the City Administration and the Council thus made clear that the no-cost dedication of street setback required by Bill 36 would not apply to the subject property, and would not affect the agreement already made.

32. Bill No. 36 was enacted as Ordinance 79-90 and signed by the Mayor on December 3, 1979.

33. During this period of time, and pursuant to the authorization contained in Finance Committee Report 1350, the City and the Campbell Estate and Austins negotiated for the acquisition of the 20-foot setback.

On June 29, 1979, the Land Acquisition Division of the Department of Public Works provided a tentative acquisition schedule. At trial, the testimony of Henry Nakagawa, responsible for Land Acquisition, shows that aside from a supplemental budget request, the schedule was completed. On March 28, 1980, Land Acquisition Officer Robert Ho wrote to Howard Green and stated:

> Reference is made to the captioned matter which may be affected by Bill 36 (1979) of which you have been in communications with the members of the City Council.
>
> The City Council, by Committee Report No. 1350 of the Committee on Finance, Expenditures & Operations, dated November 21, 1979, has approved and authorized the Administration to negotiate an agreement for deferred purchase between the City and the affected property owners which you represent.
>
> To expedite the initiation of the agreement, we have enclosed a draft of a proposal for your approval and/or comment.

34. On April 10, 1980, the Campbell Estate wrote to Mr. Ho referring to the above Finance Committee Report No. 1350, and asking for progress on the acquisition.

35. However, the draft documents which Mr. Ho submitted did not comport with prior discussions for acquisition, as set forth in a letter from Mr. Green to Mr. Ho dated May 21, 1980. His letter pointed out that the pro-

posal by the City was no more than a free option, was not what had been discussed:

> We have always taken the position that while on the one hand we did not want to be unfair and demand unreasonably high compensation, on the other hand we want the City to be fair with us also. An option is not the agreement to purchase originally promised, and the stretched out time with no interest or appreciation is in no way an expression of reasonable compensation.
>
> Particularly in view of the highly inflationary economy that promises to continue, these arrangements would not protect the land owners.

36. August 8, 1980, Mr. Miyahira wrote to the Chief Budget Officer, asking for his "recommendation and direction in effectuating a purchase agreement between the City and the owners," and enclosing Finance Committee Report 1350, "which authorizes the administration to enter into an agreement."

37. By letter of September 18, 1980, Mr. Ho wrote a letter to Mr. Green, repeating the response of the Budget Officer, as follows:

> Your letter of August 8, 1980 relative to the captioned matter was referred to the Department of Budget for their recommendation. It is their opinion that the acquisition by the City of the subject properties, would have a low budgetary priority since the street widening project is years away, if ever.

38. This was the first time that the City Administration through one of its agencies had stated that it did not intend to proceed with the acquisition, after numerous contrary representations to and agreements with the Austins and Campbell Estate, together with prohibition of construction within the 20-foot area.

This communication was made two years after the commencement of construction. The new Liberty House lease had already been entered into, the new building had been constructed, and the 20 foot setback area had been left unused as a result of the City's indications it would make the purchase.

39. William Bryant, the owners' consultant, testified that as a result of the loss of about 10,000 square feet of sales area, and 60 parking spaces, Liberty House came close to withdrawing from the deal because of the loss of economy in an already small store.

The plaintiffs had to make concessions on percentage rent in order to complete the transaction. The parking structure also became unwieldy and inefficient due to the reduction in size, resulting in loss of economy. While no claim for severance damages is made, these facts show real injury to the plaintiffs.

40. James Hallstrom, MAI appraiser, testified that no use could be made of the 20-foot strip. He testified to prevailing interest rates during the period after March 8, 1978, based on certificate of deposit investments, at an average of 11.31% per annum. Principal and interest to June 30, 1986 total $633,498.00. Per diem interest is calculated at current interest rates of 7.32%

41. The City argued that the owners have received benefit from the setback by way of bonus density compensation. The architect for the project testified, however, that while there was minor use of the setback used for open space calculation, the Liberty House project did not use the bonus.

Moreover, at the time Phase 2 of the project, a highrise tower, is built, any previously used bonus would have to be provided. It in fact had been provided in the plan for Phase 2, in the form of a grand entry foyer. Finally, once the setback is taken for street widening, the bonus would

disappear since the open space would no longer be provided.

42. The City argues that it had no money to make the acquisition, and that the King Street widening was a low priority. However, the 1979-80 budget of $425,000 was in effect until January 1, 1981. The City elected not to apply the funds to the acquisition.

At the same time, however, it found itself faced with a repetition of what had occurred with Liberty House. The owners of the Ho Building, adjacent to the Austin-Campbell land, applied for a building permit to renovate. On June 19, 1981, William Bonnet, Deputy Director of the Department of Public Works wrote to Roy Parker, Director of Transportation Services, saying that:

> As discussed this past week, we are withholding action on the Ho Building application for permit to modify, pending a reassessment of priorities by DTS. Should you decide to assign a higher priority to the widening project, we may take action to acquire the Ho property.
>
> • • •
>
> Building Department has been informed of our present position, but we will need an Administration position quickly or the application will have to be approved and released.

43. In 1982, the City allocated $310,000 plus $35,000 for demolition, and then acquired the Ho building. This action shows that the King Street widening continued to be high priority, and that funds were available for acquisition, but only under the immediate pressure of a building permit application.

44. Roy Parker, head of Transportation Services, then took the position that the owner should give the setback to the City without receiving compensation for it.

45. Mr. Miyahira testified that he did not know what more the owners could have done to ensure payment.

46. The parties have stipulated that the value of the setback area was $260,000.00 as of March 8, 1978.

CONCLUSIONS OF LAW

Plaintiffs own the fee interest in Tax Map Key No. 2-1-02:4, including, in particular, 2659 square feet of setback property fronting along the mauka side of King Street, in Honolulu, Hawaii.

The defendant has argued that the statute of limitations has run on this cause of action. In *Wilson v. Garcia,* 105 S.Ct. 1938 (1985), the United States Supreme Court held that in every section 1983 action, the court should apply the statute of limitations which would govern a personal injury action in the state.

In the case at bar, Hawaii Revised Statute §657-7 provides a two-year statute of limitations for actions for the recovery of compensation for damage to persons or property.

Because the complaint in this case as filed in 1984, before the *Wilson* decision, the plaintiffs' complaint alleging deprivation of property without just compensation, at the time it was filed, would have fallen within the six-year statute of limitations period allowed under Hawaii Revised Statutes section 657-1(4). *Lai v. City and County of Honolulu,* 749 F.2d 588 (9th Cir. 1984); *Matthewman v. Akahane,* 574 F.Supp. 1510 (D. Hawaii 1983).

In *Gibson v. United States,* 781 F.2d 1334 (9th Cir. 1986), the Ninth Circuit held that "*Wilson* should not be retroactively applied to oust claims that were timely when filed." *Gibson,* 781 F.2d at 1340. Therefore, pursuant to the non-retroactive principle of *Wilson,* the applicable six year statute of limitations had not yet run at the time the case at bar was filed.

The Fifth Amendment of the United States Constitution, applicable to the states through the Fourteenth Amendment provides in part: "nor shall private property be taken for public use, without just compensation."

A taking can occur through the application of a general zoning law to particular property. The government effects a taking if (1) the ordinance does not substantially advance legitimate state interests, *see Nectow v. Cambridge,* 277 U.S. 183, 188 48 S.Ct. 447, 448 (1928), or (2) it denies an owner economically viable use of his land, *see Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 138 n. 36, 98 S.Ct. 2646, 2666 n. 36 (1978). *Agins,* 447 U.S. ___, 260, 100 S.Ct. ___, 2141 (1980). (quoted in *Sederquist v. City of Tiburon,* 765 F.2d 756, 761 (9th Cir. 1984).

Although the decision in *Penn Central,* 438 U.S. at 125, 98 S.Ct. at 2659 indicates that land use regulations that have adversely affected recognized property interests can be found not to constitute a compensable taking, the court must base its decision upon the evidence admitted in the case at bar.

There is no precise formula to determine when a regulation has gone so far as to require compensation; it is essentially a factual inquiry. The crucial factors to be considered are the economic impact of the regulation, especially the extent to which it interferes with the landowner's investment-backed expectation, and the character of the government's action. *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 432, 102 S.Ct. 3164, 3174 (1982).

In *Kirby Forest Industries, Inc. v. United States,* 467 U.S. 1, 104 S.Ct. 2187 (1984), the Supreme Court recognized that a radical curtailment of a landowner's freedom to make use of or ability to derive income from his land may give rise to a taking within the meaning of the Fifth Amendment, even if the Government has not phys-

ically intruded upon the premises or acquired a legal interest in the property.

The Court has also acknowledged that a taking would be effected by a zoning ordinance that deprived an owner of any economically viable use of his land. *Agins*, 477 U.S. 255, 169, 100 S.Ct. 2138, 2141 (1980).

No credible evidence of possible alternative uses for the 2659 square foot parcel set-back parcel has been offered during the course of this proceeding. The plaintiffs offered credible testimony from a recognized expert in the field that the setback parcel has been rendered valueless by the owner's inability to build on it. The defendant offered testimony from John Lockhart, who testified that based on his five or six visits to the parcel, people seek out the wider sidewalk.

The scant content of the defendant's testimony, and the demeanor of the defendant's witness while testifying do not adequately support the proposition that the parcel retains any value for the plaintiffs. The court, however, is persuaded by the testimony of James Hallstrom and William Bryant that the plaintiffs derive no economic use from the 2659 square foot parcel in the setback area. The court cannot conjecture about possible alternative uses for the land. Therefore, based on the evidence presented at trial, the court concludes that the parcel was rendered valueless.

The parties entered into a stipulation regarding the date on which the taking, if any, occurred. The stipulation was entered in the record on July 1, 1986, prior to the opening statements in the trail. The parties stipulated that if a taking took place, it occurred on March 8, 1978.

The plaintiffs have argued that its property was taken by the defendant through the City Council action on March 8, 1978 (Committee Report No. 1). Further, plaintiffs argue that the Council resolution effected a taking by prohibiting building within the setback area.

On March 8, 1978, the Council Committees on Planning and Finance issued their joint report, Committee Report No. 1, confirming that the Finance Committee concurred with the Planning Committee that the twenty-foot setback line should be observed and that the City should budget to acquire the property during the upcoming six-year period. This report was adopted by Council on March 8, 1978.

William Miller, Governmental Affairs Officer for Campbell Estate, had a number of conversations with Messrs. Akahane and Matsumoto, two Council members, during which they affirmed that the Council action was a commitment on the part of the City, and that it would be placed in the six-year CIP as well as the next year's budget.

The taking did occur on March 8, 1978 because the adoption of the joint resolution of the Committees of Finance & Planning confirmed the City's plan to acquire the property in question. By the resolution of March 8, 1978, the Council effectively precluded the use of this property by the plaintiffs. Any consideration by the plaintiffs of seeking a zoning variance for commercial use of this property was likewise futile after this date. On that date, the City Council directed the City administration to budget for the future payment of this property within the following six years. Thereafter, plaintiffs decided to lease its land and allowed Liberty House to design its building in accordance with the clear mandate of the March 8th resolution.

The evidence further showed that at least $150,000 was designated in the budget for land acquisition. Mayor Fasi's line-veto of that item cannot be construed as a lessening of the City's commitment to acquire. The veto was principally a reflection of a dispute over the allocation of federal revenue sharing money to the general operation budget as opposed to allocation of the federal revenue to the capitol improvement budget. At all times until September

18, 1980, all parties including the plaintiffs, City Council and City agencies proceeded as if ultimate acquisition and payment were on schedule.

City agencies and Council members had entered into the correspondence recounted earlier in this decision, in which the City was committed to the position that the City would pay for the setback parcel. The evidence shows that the first indication that the City might not purchase the parcel outright came in Mr. Kenneth Ho's September 18, 1980 letter when for the first time the City indicated that acquisition of this property was a low priority item.

The City has raised several legal arguments to defeat the owners' claims, such as that the owners should have contested the matter before the Zoning Board of Appeals, or that the Council had not given final approval.

The City put forward no evidence that any member of any City agency or any Council member or any representative of the Mayor ever informed the plaintiffs that they should go before the Zoning Board of Appeals to seek a variance.

Because the representatives of the City gave every indication that appeal to the Zoning Board of Appeals was not a necessary step, they should not now be able to argue that the plaintiffs should have made such an appeal. Additionally, as earlier indicated, a zoning variance after March 8, 1978 was unnecessary and no longer a viable alternative for the plaintiffs.

The record before the court reveals that the only step which remained before payment could be made to the plaintiffs in 1979 was the Mayor's signature and the official appraisal of the property. The City agencies and Council members had committed the City to the position that the City would pay for the setback parcel, through the statements they had made to the plaintiffs and because they had not raised any objection when the plaintiffs in-

dicated that they expected to be paid when they planned to have the new Liberty House building constructed within the smaller area.

The Defendant's planned street widening project is for the public use and benefit.

The court finds that the plaintiffs sustained their burden of proof by a preponderance of the evidence. Plaintiffs are entitled to just compensation for the part of their property taken in the amount stipulated between the parties of $260,000.00. Interest is an element of just compensation.

The City had a sum of money available in the appropriations budget which could have been paid in part or in full for the purchase of the 2659 square foot parcel. The last date on which the City could have paid the sum towards the purchase of the parcel was January 1, 1981. As an element of compensation in this case, the interest is allowed and may be calculated as beginning no earlier than the last date on which the City could have purchased the property, on January 1, 1981.

The court accepts the testimony of James Hallstrom regarding the prevailing interest rates, and the calculations shown on plaintiffs' exhibit 79.

The plaintiff in this case is entitled to judgment in the amount of $260,000.00 and with interest to commence from the date of January 1, 1981, in such amount as shall be determined using the prevailing rates of interest shown on plaintiffs' exhibit 79. The plaintiffs are ORDERED to calculate the total amount of interest due from January 1, 1981 through the date judgment is entered in this case, and for such amount consistent with this decision. The City shall be assessed no exemplary damages.

The plaintiff shall prepare and submit for the court's approval the final form of the judgment.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, AUG 29 1986

United States District Judge

JAMES W. AUSTIN, et al. v. THE CITY AND COUNTY OF HONOLULU, CIVIL NO. 84-0035, DECISION AND ORDER

APPENDIX D

UNITED STATES COURT OF APPEALS, NINTH CIRCUIT.

No. 87-1689.

Clifford Y.C. LAI and Victoria L. Lai,
Plaintiffs-Appellees,

v.

CITY AND COUNTY OF HONOLULU,
a municipal corporation,
Defendant-Appellant.

Argued and Submitted Jan. 15, 1988.
Decided March 7, 1988.

Developer brought action against city and county alleging zoning ordinance resulted in compensable taking of property. The United States District Court for the District of Hawaii, 562 F.Supp. 903, dismissed action and appeal was taken. The Court of Appeals, 749 F.2d 588, reversed and remanded. On remand the District Court, Samuel P. King, J., entered judgment for developer and appeal was taken. The Court of Appeals, Schroeder, Circuit Judge, held that developer failed to seek variance from zoning ordinance, so that developer had not yet obtained final and authoritative determination by state court so that taking claim was not ripe for review.

Reversed and vacated.

Ronald B. Mun, Honolulu, Hawaii, for defendant-appellant.

David Bettencourt, Honolulu, Hawaii, for plaintiffs-appellees.

Appeal from the United States District Court for the District of Hawaii.

Before SKOPIL, Jr. and

SCHROEDER, and ALDISERT,* Circuit Judges.

SCHROEDER, Circuit Judge:

The City and County of Honolulu appeal the district court's money judgment in favor of the Lais in an inverse condemnation action. In 1975, the City enacted a zoning ordinance, placing restrictions within a designated area on construction more than twenty-five feet above ground level. The purpose was to protect the view of the Punchbowl Crater from the H-1 Freeway. The Lais, owners of a development lease, were denied a Certificate of Appropriateness for their proposed high-rise condominiums due to the zoning ordinance. The Lais sued the City, contending that the ordinance constituted a compensable "taking" of their property, and won a judgment in their favor in the district court. We reverse and remand to the district court with instructions to dismiss because the plaintiffs have no "taking" claim which is yet ripe.

In 1971, the Lais purchased their leasehold interest in a 30,000 square foot lot with rental units in Honolulu. The property is located near the Punchbowl Crater, a historic and scenic attraction. In 1974, the Lais entered into an arrangement with a developer, who planned to build condominium apartments in conformance with the existing zoning height limitation of 350 feet.

In 1975, the City of Honolulu enacted Ordinance Number 4488, establishing the Punchbowl District as Historic, Cultural and Scenic District Number 3. The City's expressed purpose in enacting the ordinance was to establish

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* Honorable Ruggero J. Aldisert, Senior U.S. Circuit Judge for the Third Circuit, sitting by designation.

a scenic easement to protect one view of the Punchbowl Crater from the H-1 Freeway. The ordinance therefore restricted construction more than twenty-five feet above ground level.

In 1976, the Lais' developer requested a Certificate of Appropriateness from the Honolulu City Council to build its condominium apartments. The City Council voted to deny the developer's application, citing eight considerations including the proposed project's height.

On September 14, 1978, the Lais sued the City and County of Honolulu under the Civil Rights Act of 1871, 42 U.S.C. § 1983, challenging the scenic easement imposed upon their property as a "taking" without just compensation and seeking damages. They also asserted alternative theories for compensation or equitable relief.

The facts established at trial, as found by the district court, showed only that a scenic easement had diminished the value of the plaintiffs' property. However, the Supreme Court has specifically stated that its decisions sustaining land-use regulations that "are reasonably related to the promotion of the general welfare, uniformly reject the proposition that diminution in property value, standing alone, can establish a 'taking.' " *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104, 131, 98 S.Ct. 2646, 2662-63, 57 L.Ed.2d 631 (1978). The district court found that the Lais could build a 51-unit residential development on the property that would conform to the zoning requirements and restrictions. The inability to reap as great a profit as one might have absent the zoning restriction, does not equate with a "taking." *William C. Haas & Co. v. City and County of San Francisco,* 605 F.2d 1117, 1120-21 (9th Cir.1979), *cert. denied,* 445 U.S. 928, 100 S.Ct. 1315, 63 L.Ed.2d 761 (1980). In its most recent pronouncement of last Term, the Supreme Court expressly stated that a height limitation preserving the public's scenic view is not a "taking." *Nollan v. California Coastal*

Commission, ___U.S. ___, 107 S.Ct. 3141, 3147-48, 97 L.Ed.2d 677 (1987). Plaintiffs in this case also alleged alternative "taking" theories which the district court did not reach.

We cannot rule definitively on the merits of any of plaintiff's theories, however, because the plaintiffs must pursue all avenues of relief before presenting a "taking" claim in federal court. Under *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985), a plaintiff's claim is not ripe until "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." This requires that the plaintiffs seek variances from the regulations. *Id.* at 186-88, 105 S.Ct. at 3117; *see also Lake Nacimiento Ranch Co. v. San Luis Obispo County*, 830 F.2d 977, 980 (9th Cir.1987); *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1453-54 (9th Cir.), *amended*, 830 F.2d 968 (9th Cir.1987), *cert. denied*, ___U.S. ___, 108 S.Ct. 775, 98 L.Ed.2d 861 (1988). A plaintiff must also "seek compensation through the procedures the State has provided for doing so." *Hamilton Bank*, 473 U.S. at 194, 105 S.Ct. at 3121.

Here, although the parties agree that there are no state procedures for such compensation claims, the Lais did not seek a variance. Since both sides have pointed out to us on appeal that other exceptions to the ordinance's height restriction been granted during the long course of this litigation, we must conclude that the Lais have not yet obtained a "final and authoritative determination of the type and intensity of development legally permitted on the subject property. A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." *McDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 106 S.Ct. 2561, 2566, 91 L.Ed.2d 285 (1986); *see also Shelter Creek Development Corp. v.*

City of Oxnard, 838 F.2d 375, 377-379 (9th Cir.1988).

We therefore hold that the Lais do not yet have a justiciable claim.

REVERSED, with orders to VACATE the judgment and dismiss the complaint without prejudice.

APPENDIX E

CITY & COUNTY v. CHUN

Syllabus.

CITY AND COUNTY OF HONOLULU,
a municipal corporation,
Plaintiff-Appellee

,v.

FREDERIC KWAI TIN CHUN, RUBY WONG CHUN,
Defendants-Appellants,
and AETNA LIFE INSURANCE COMPANY
and FINANCE FACTORS, LIMITED,
Defendants

No. 5218

Appeal From First Circuit Court Hon. Allen R. Hawkins, Judge

February 14, 1973

Richardson, C.J., Marumoto, Abe, Levinson and Kobayashi, JJ.

OPINION OF THE COURT BY ABE, J.

The appellants, hereinafter referred to as the "Chuns," are owners of property located at the corner of Prospect and Emerson Streets in the City and County of Honolulu. The property runs along the hillside of Punchbowl and slopes toward Prospect Street. Prior to April 30, 1969, the Chuns had received approval of their plan for the construction of an apartment on the subject property.

On April 30, 1969, the appellee, hereinafter referred to as the "City and County," notified the Chuns that the City and County had authorized acquisition of a portion of their property for a proposed street widening project. A moss rock retaining wall which provided lateral support for the Chun's property was located on the two parcels that the City and County was authorized to acquire.

Sometime after the notice of April 30, 1969, but before the date of summons of the condemnation action now before this court, the Chuns, on advice of their structural engineer, caused a new concrete retaining wall to be built on the setback line indicated by the proposed street widening project. The uncontradicted testimony in a jury-waived trial reveals that the new wall would have been necessary if the old moss rock wall were removed, and economies were realized in constructing the wall at the same time as the apartment was being built since men and equipment were on the site and the weight of the partially constructed building would entail less technological difficulties than would have been encountered if the completed building were on the same land.

The trial court awarded the Chuns $36,386.00 for the land and $5,800.00 for the old wall. The trial court further found "[t]hat on September 24, 1970, the dated[*sic*] of summons, the defendant sustained no severance damages as a result of the condemnation of said parcels 1 & 2 including the new concrete retaining wall and other improvements claimed by the defendants."

The only question before this court is whether the trial court properly denied the Chuns severance damages for the new concrete retaining wall. We hold that it did.

We do not believe that anything was damaged or taken except the land actually taken and an old moss rock wall. The law in this jurisdiction is that in a condemnation action the date of summons establishes the point in time at which the compensation for property taken or damaged due to partial taking is to be computed, HRS § 101-24 provides:

> "For the purpose of assessing compensation and damages, the right thereto shall be deemed to have accrued at the *date of summons,* and except as provided in section 46-6, its actual value *at that date* shall be the measure of valuation of all property to be condemned, and the basis of damage to property

> by reason of its severance from the portion sought to be condemned, subject, however, to section 101-23." (Emphasis added.)

HRS § 46-6 pertaining to county ordinances to require a subdivider to provide park and playground facilities has no application in this case. HRS § 101-23 covers valuation methods and is not germane to our present discussion of fixing the time at which these methods should apply,.

In construing the same language in RLH 1935 § 64 this court in *Honolulu* v. *Lord*, 36 Haw. 348, 354 (1943), held that:

> "To say that the defendant's right to compensation and damages shall be deemed to have 'accrued' at the date of the summons is equivalent to saying that his property shall be deemed to have been taken at that time."

The language in the statute must also mean that severance damages are sustained at the date of summons.

At the date of summons in this case, the new concrete wall had already been built. The new concrete wall was not taken; lateral support for the Chun's remaining land was not taken since the new wall provided such support, nor do we perceive any severance damage to the land or improvement thereon not condemned.

The cases cited in the Chuns' brief for the proposition that building of a wall is compensable where the wall is necessary to restore the condemnees' remaining property to its previously available use are distinguishable from the case now before us. The Chuns built the wall *before* the commencement of the condemnation action. In each of the cases cited by the Chuns, the wall was built *after* the condemnor had commenced condemnation proceedings.

It is true that construction of the wall before the date of summons lessens the cost of condemnation to the City

and County. However, the law is too clear, and we cannot support Chuns' contention that a taking had occurred before the date of service of summons.

"The mere passage of legislation authorizing acquisition of property by eminent domain is ordinarily not sufficient in and of itself to constitute a taking." 2 *Nichols on Eminent Domain* § 6.13. Nor is taking or damaging of property accomplished by negotiating to purchase it. *Eckoff* v. *Forest Preserve Dist.*, 377 Ill. 208, 36 N.E. 2d 245 (1941).

We deem the Chuns' argument with respect to estoppel without merit.

The judgment and orders appealed from are affirmed.

Arthur S. K. Fong for defendants-appellants.

Wesley Fong, Deputy Corporation Counsel (*Paul Devens*, Corporation Counsel, and *Winston H. Jensen*, Deputy Corporation Counsel, on the brief), for plaintiff-appellee.

DISSENTING OPINION OF LEVINSON, J.

I dissent. Since this is a case of first impression, I believe we are obligated to examine the issues raised with greater thoroughness than is achieved by the majority's disposition on the sole basis of the language of HRS § 101-24. To say that the language speaks for itself, which the majority in effect does here, is self-serving and hardly an adequate response to the requirement of just compensation imposed by the Constitutions of the United States and the State of Hawaii.[1] HRS § 101-24, which sets the

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[1] The Fifth Amendment to the United States Constitution says, in part: [N]or shall private property be taken for public use, without just compensation.

Article I, section 18 of Hawaii's Constitution provides:

Private property shall not be taken or damaged for public use without just compensation.

date of valuation for purposes of compensation at the time of summons, is not necessarily dispositive.

It should be noted at the outset that the appellants clearly would have been entitled to compensation for the lateral support provided by the land taken and the old moss rock retaining wall if the appellants had elected to postpone erecting a new wall until after the high-rise apartment building was constructed and the summons issued in the eminent domain proceedings. 4A Nichols, The Law of Eminent Domain § 14.244[3] (Rev. 3d ed. 1971). The result of such an election, however, would have been a greater cost to the condemnor, because at the later point in time the men and equipment necessary to build the wall would have had to be returned to the site and the engineering problems to be solved would have been more difficult. The landowner decided to mitigate damages and should not be penalized for having done so.

Despite the fact that on its face, at least, HRS § 101-24 does not authorize compensation for the lateral support provided by the land taken and the old moss rock wall, since the new wall was already in place and providing lateral support on the date of summons, the constitutional requirements of just compensation must be given effect. In a condemnation case decided by the United States Supreme Court last month, *United States* v. *Fuller*, 409 U.S. 408 (1973), Mr. Justice Rehnquist's opinion for the Court furnished a succinct summation of just compensation, truly capturing its spirit:

> Our prior decisions have variously defined the term "just compensation" which the Fifth Amendment requires to be made when the Government exercises its power of eminent domain. The owner is entitled to fair market value, *United States* v. *Miller*, 317 U.S. 369, 374 (1943), but that term is "not an absolute standard nor an exclusive method of valuation." *United States* v. *Virginia Electric & Power Co.*, 365

> U.S. 624, 633 (1961). The constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness, *United States* v. *Commodities Trading Corp.*, 339 U.S. 121, 124, (1950), as it does from technical concepts of property law.

A significant decision was rendered by a unanimous Supreme Court of California in *Klopping* v. *City of Whittier*, 8 Cal. 3d 39, 500 P.2d 1345, 104 Cal. Rptr. 1 (1972). That case involved a resolution by the city to create a parking district, after which condemnation proceedings were initiated against the plaintiff's property and assessments were levied to pay for the costs. The legality of the assessments was challenged, and the city adopted a second resolution, authorizing the dismissal of the pending condemnation suits, but declaring an intention to reinstitute them when and if the controversy over the assessments was terminated in the city's favor.

The opinion in *Klopping* quotes the provision of article I, § 14 of the California Constitution that "Private property shall not be taken or damaged for public use without just compensation having been first made to . . . the owner . . . ." The opinion then says that "a variety of circumstances may actually becloud the proper valuation date. While in California this date is set by statute at the time the summons is issued (Code Civ. Proc. § 1249), depending on the nature of those activities occurring prior to the issuance of summons a different date may be required in order to effectuate the consitutional requirement of just compensation." [8 Cal. 3d at 44, 500 P.2d at 1349, 104 Cal. Rptr. at 5.] The court held that the owner was entitled to the loss of rental income between the date of the precondemnation announcements and the date of summons caused by the announcements in addition to the value of the property on the date of summons and that recovery of both items of damage (loss of rental income and value of property) should have been accomplished in one action.

Application of the principles enunciated in *Klopping* to the facts of the present case inevitably leads to the conclusion that the landowners must be compensated for the difference between the cost of the new retaining wall and the amount allowed for the old wall.

I would reverse and allow the appellants the additional amount of $13,900, which represents the difference between the $19,700 cost of the new wall and $5,800 which was allowed for the old wall.

APPENDIX F

ROBERT ALLEN and GRACE GUNN, Plaintiffs-Appellees, *v.* CITY AND COUNTY OF HONOLULU, Defendant-Appellant

NO. 5957

APPEAL FROM FIRST CIRCUIT COURT
HONORABLE NORITO KAWAKAMI, JUDGE

NOVEMBER 3, 1977

RICHARDSON, C.J., KOBAYASHI, OGATA, MENOR AND KIDWELL, JJ.

OPINION OF THE COURT BY KOBAYASHI, J.

The City and County of Honolulu (hereinafter the City) brings this appeal from a judgment of the trial court granting money damages to Grace Gunn and Robert Allen (hereinafter appellees). The trial court ruled that the City, by rezoning appellees' property, was liable for costs incurred by the appellees in reliance on the zoning applicable to the property when they purchased it.

For reasons stated hereinafter, we reverse.

ISSUE

The central issue presented by this appeal is whether the trial court erred in granting damages for the development costs incurred by appellees.

FACTS

Appellees, a real estate agent and a developer, sought land suitable for residential development. They purchased the oceanfront property which is the subject of this appeal only after inquiring about its zoning and discussing development alternatives with an architect, Jo Paul Rognstad. On November 8, 1972, the appellees purchased the

property identified by Tax Map Key Nos. 6-8-11-46 and 47 situated at Kamananui, Waialua, Oahu, Hawaii, for $207,400.00. At the time of the purchase, and since the adoption of the Comprehensive Zoning Code in 1969, the property was zoned A-3. This classification allows, among other things, construction not exceeding a height of 350 feet.

On or about November 10, 1972, appellees retained the professional services of Rognstad and he commenced architectural, engineering and other work necessary to obtain a building permit from the City for an eleven-story condominium structure. On March 20, 1973, Rognstad submitted appellees' permit application to the City's Building Department.

On March 6, 1973, ". . . in response to political pressure from certain residents in Waialua to prevent highrise construction in the area",[1] Bill No. 46, Draft 1, entitled "An Ordinance to Rezone a Portion of A-3 Apartment District Nos. R-8 and R-19 situated at Mokuleia, Waialua, Oahu, Hawaii, to A-2 Apartment District No. R-6", was introduced to the City Council. Appellees learned of the proposal to amend the zoning in a newspaper article on or about March 3, 1973, and appellee Allen later testified in opposition to the proposal at the public hearing held concerning Bill 46.

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[1] Trial court's Finding of Fact No. 8 reads:

8. On March 6, 1973, Bill No. 46, Draft 1, entitled "An Ordinance to Rezone a Portion of A-3 Apartment District Nos. R-8 and R-19 situated at Mokuleia. Waialua, Oshu, Hawaii to A-2 Apartment District No. R-64" was introduced in response to political pressure from certain residents in Waialua to prevent highrise construction in the area. Bill 46 (Draft 2) was subsequently enacted into law as Ordinance 4145 effective May 15, 1973. Buildings constructed in an area zoned A2 may have a maximum height of 40 feet according to Comprehensive Zoning Code Section 21-613. The building which Plaintiffs proposed to erect conformed to the height and area limitations of an A-3 district but would not be permitted in an A-2 district.

By May 14, 1973, several government agencies had initialed their approval on the permit application, but on May 15, 1973, the zoning amendment took effect as Ordinance 4145. Thereafter the permit application and construction plans were withdrawn by the appellees. The permit was neither granted nor denied by the Building Department.

Appellees claimed they had spent $77,017.26 in nonrecoverable expenses on account of the downzoning and sought damages in that amount at trial. The trial court found, as stated in its Finding of Fact No. 12, that:

> 12. Prior to the effective date of Ordinance 4145, the Plaintiffs in reliance on the A-3 zoning then in effect and on the reasonable probability that a building permit would be issued, substantially changed their position and incurred certain nonrecoverable costs for the development of their property in the amount of $67,950.26 for which they were and are liable.

The trial court stated in its Conclusions of Law:

> 1. Plaintiffs had the right to rely on the zoning requirements existing prior to the effective date of Ordinance 4145.
>
> 2. The City is liable for the costs incurred by the Plaintiffs in reliance on the then existing A-3 zoning and on the reasonable probability of the issuance of a building permit.
>
> 3. The mere introduction of Bill 46 on March 6, 1973 does not constitute notice to the Plaintiffs that the zoning would be changed.

OPINION

Appellees based their claim for damages on two distinct legal theories, vested right and equitable estoppel. Though theoretically distinct, courts across the country seem to

reach the same results when applying these defenses to identical factual situations. As stated in Heeter, *"Zoning Estoppel: Application of the Principles of Equitable Estoppel and Vested Rights to Zoning Disputes"*, 1971 Urban L. Ann. 63 at 64-65:

> . . .The defense of estoppel is derived from equity, but the defense of vested rights reflects principles of common and constitutional law. Similarly their elements are different. Estoppel focuses on whether it would be inequitable to allow the government to repudiate its prior conduct; vested rights upon whether the owner acquired real property rights which cannot be taken away by governmental regulation. Nevertheless, the courts seem to reach the same results when applying these defenses to identical factual situations. (Footnotes omitted.)

The California Supreme Court spoke in terms of vested rights when it denied a developer a writ of mandamus to compel the California Coastal Zone Commission to grant an exemption to its permit requirements. *Avco Community Developers, Inc. v. South Coast Regional Commission,* 17 Cal.3d 785, 132 Cal. Rptr. 386, 553 P.2d 546 (1976), *cert. den.* 429 U.S. 1083 (1977). But in *Hollywood Beach Hotel Co. v. City of Hollywood,* 329 So.2d 10 (Fla. 1976), the Florida Supreme Court held that the City was equitably estopped from rezoning petitioner's property in order to halt multi-family residential development. But, as in California, the Illinois Appellate Court, Second District, held that the developers did not acquire a vested right in the former zoning classification which would entitle them to a writ of mandamus to compel the removal of a stop work order. *First National Bank & Trust Co. v. City of Rockford,* 47 Ill. App.3d 131, 361 N.E.2d 832 (1977).

The only Hawaii Supreme Court case dealing with this issue spoke in terms of estoppel. *Denning v. County of Maui,* 52 Haw. 653, 485 P.2d 1048 (1971). The Court, at

52 Haw. 658-59, 485 P.2d at 1051, set the standard for applying the doctrine of equitable estoppel in zoning disputes, wherein this court stated:

> The "rule of law" laid down by the trial court was, in summary:'
>
> If Denning expended substantial sums for the preparation of plans and documents in good faith reliance upon law prior to Ordinance 641 and which expenditures were incurred upon the reasonable probability of a building permit being issued then Denning must be allowed the right to proceed.

We further stated at 52 Haw. 658-59, 485 P.2d at 1051:

> In order to avoid unnecessary appellate proceedings and for the proper guidance of the trial court, we are of the opinion that for Denning to be allowed the right to proceed in constructing the planned structure the facts must show that Denning had been given assurances of some form by appellants that Denning's proposed construction met zoning requirements. And that Denning had a right to rely on such assurances thereby equitably estopping appellants from enforcing the terms of Ordinance No. 641.
>
> . . . .
>
> Mere good faith expectancy that a permit will issue does not create in a property owner a right to continue proposed construction.

But we need not decide here whether the City should be estopped from enforcing the terms of Ordinance 4145. *Denning, supra,* does not deal at all with the issue of payment of damages by the government for the development costs of the petitioners, but speaks only in terms of the right to proceed with construction. In each of the cases cited by the parties in their briefs and in each case found by this court where a developer has been held to have a

vested right to a building permit, or the government held to be equitably estopped from enforcing new land use regulations, the remedy awarded has been a declaratory ruling that the new regulation is unlawful as applied to that developer, or a writ compelling the issuance of a permit. The remedy is to allow continued construction, not award damages. Here, the trial court ruled that appellees had a right to rely on the A-3 zoning and that the City was liable for appellees' nonrecoverable preparatory expenses. On review of the record it is difficult to ascertain the basis of that ruling.

The record does show that this case was the last of three heard by the same court concerning Ordinance 4145. The first two, *Guerin v. Yuasa, et al.*, Civil No. 39390, and *Hale Kona Kai Development Corp. v. Yuasa, et al.*, Civil No. 39391 (together hereinafter referred to as *Guerin*), were tried together, the Findings of Fact and Conclusions of Law, along with the Stipulation for Judgment were received in evidence below and made a part of the record of this appeal. *Guerin* involved other developers in Mokuleia, but differed factually from the case at bar in that those developers had been issued building permits (albeit by court mandate) and had begun actual construction. After the adoption of Ordinance 4145 the City revoked the permits. The trial court ruled in *Guerin* that the permits were rightfully revoked but held the City liable for the developers' wasted expenses. Not part of the record on appeal here, but a matter which this court may properly take judicial notice of (*see In re Ellis*, 55 Haw. 458, 522 P.2d 460 (1974), *cert. den.* 419 U.S. 1109 (1975)), is the fact that the plaintiffs in *Guerin* did not seek monetary award but declaratory and injunctive relief that would permit them to complete the construction they had begun. It should be noted that no appeal was taken in *Guerin*.

It seems apparent that the trial court, in fashioning the remedy it did in *Guerin*, and again in this case, was attempting to protect the community from undesirable de-

velopment, yet not penalize landowners for what the trial court believed was a politically motivated change in the laws. The trial court in this case stated, responding to an assertion by the attorney for the City that money damages would be inappropriate:

> The court is taking judicial notice from the facts in the other case and from the newspapers at the time, the news stories at the time that this was going on, that the—and the fact that the business area is still allowing, in the B-2, 300 feet height; that the only reason that this ordinance was passed was because of the pressure of the citizens of that community; that this was not an ordinary piece of legislation.

In our opinion, to permit damages for development costs is not only unprecedented but would also be unsound policy. Were we to affirm the award of damages, the City would be unable to act, if each time it sought to rezone an area of land it feared judicially forced compensation. Monetary awards in zoning disputes would inhibit governmental experimentation in land use controls and have a detrimental effect on the community's control of the allocation of its resources. An article dealing with inverse condemnation, another type of monetary award in downzoning cases states:

> The weighing of costs and benefits is essentially a legislative process. In enacting a zoning ordinance, the legislative body assesses the desirability of a program on the assumption that compensation will not be required to achieve the objectives of that ordinance. Determining that a particular land use control requires compensation is an appropriate[2] function of the

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[2] A footnote, No. 53, of the text states:

The expenditure of public funds is an inappropriate function for the

> judiciary, whose function includes protection of individuals against excesses of government. But it seems a usurpation of legislative power for a court to force compensation. Invalidation, rather than forced compensation, would seem to be the more expedient means of remedying legislative excesses. (Footnotes omitted.)

Fulham and Scharf, *"Inverse Condemnation: Its Availability in Challenging the Validity of a Zoning Ordinance"*, 26 Stanford L. Rev. 1439, 1450-51 (1974).

Prohibiting damages for development costs does not mean that a property owner must suffer an injury without compensation, for if the facts establish that the doctrine of equitable estoppel should apply to prevent the City from enforcing newly enacted prohibitive zoning, then the property owner is entitled to continue construction. Once the City is estopped from enforcing the new zoning, if it still feels the development must be halted, it must look to its powers of eminent domain. In order for the City to operate with any sense of financial responsibility the choice between continued construction and paying to have it stopped by condemnation, if possible, must rest with the City—not property owners.

Accordingly, the order of the trial court granting damages for appellees development costs is reversed.

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judicial branch, which is unable to consider and weigh community interests as well as is the legislative branch. Courts also lack the flexibility of legislatures, as a court is faced with an all-or-nothing decision, while a legislative body has a wider range of alternatives. Professor Van Alstyne, however, suggests that a complete range of intermediate positions is possible even for courts. [Citations omitted.]